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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KYHALLISTA JOHNSON as
Administrator of the Estate of
DION HARRELL,

Plaintiff,

v.

STATE OF NEW JERSEY, NEW
JERSEY DEPARTMENT OF LAW AND
PUBLIC SAFETY, DIVISION OF
STATE POLICE, JOHN T. NICHOLS,
BRIAN O’GIBNEY, AND CITY OF
LONG BRANCH,

Defendants

Civil Action No. 3:18-cv-11299-
FLW-ZNG

**DECLARATION OF FRANK J.
DYEVOICH**

FRANK J. DYEVOICH, an attorney duly admitted to practice law before the Courts of the State of New Jersey, and attorney for Defendants City of Long Branch and Brian O’Gibney (hereinafter “City Defendants”), affirms the following to be true under penalty of perjury:

1. I am an attorney with Rainone Coughlin Minchello, LLC, and our office represents the City Defendants in this matter, and as such, I am familiar with the facts and circumstances surrounding the issues of this case. I make this affirmation in support of the

City Defendants' opposition to Plaintiff's motion to amend the Complaint to assert Brady allegations.

2. From May 13, 1992 through May 19, 1992, the trial took place for the criminal charge of sexual assault against Plaintiff, Dion Harrell.

3. Attached hereto as **Exhibit A** is a true and accurate copy of the trial testimony of Co-Defendant John T. Nichols ("Nichols"), the New Jersey State lab technician who tested the samples provided by the victim and Plaintiff, Dion Harrell.

4. Nichols testified that both the victim and the Defendant (Harrell) were both possessors of Substance H belonging to Blood Group O and were both secretors. He testified that the Defendant could be within the 16% of the male population that could have caused the seminal stain on the victim's clothing.

5. Defendant Harrell's counsel did not attempt to impeach the credibility of the test results on cross-examination of Nichols.

6. Attached hereto as **Exhibit B** is a true and accurate copy of the closing argument made by Plaintiff's defense attorney during his criminal trial.

7. Plaintiff's defense attorney made the argument that because the victim and Defendant were both possessors of substance H, belonged to the blood group O, and were both secretors, that

the lab's test results were inconclusive and provided no information beyond their genetic makeups.

8. Attached hereto as **Exhibit C** is a true and accurate copy of the victim's testimony during the criminal trial of Plaintiff, Dion Harrell.

9. The victim testified that she had seen Plaintiff's face before the attack, saw his face up close during the attack, and recognized his face as the man who raped her after the fact when she was working in McDonald's and he walked into the restaurant.

10. On August 21, 2020, Plaintiff took the deposition of Nichols, who performed the forensic testing at issue.

11. Attached hereto as **Exhibit D** is a true and accurate excerpt from the deposition of John T. Nichols.

12. Nichols testified that he was not required to write a conclusion that the samples were inconclusive in his report.

13. On June 2, 2022, Henry Swordsma's deposition was taken, who was the supervisor to Nichols during the testing at issue.

14. Attached hereto as **Exhibit E** is a true and accurate excerpt from the deposition of Henry Swordsma.

15. Swordsma testified that the testing results, namely that both the victim and Defendant were both substance H blood group O secretors, and that the information was included in the testing reports. He further testified that it was not required to write in the report that because of this, the testing was inconclusive.

16. The fact that Swordsma testified that he told Officer Crumrine that the testing was inconclusive is insubstantial evidence to suggest that Crumrine never told this information to Prosecutor Michael K. Cunningham.

17. The facts are that no one knows what was spoken about between Crumrine and Prosecutor Cunningham, and it is impossible to find out since both Crumrine and Prosecutor Cunningham are deceased.

18. Officer Gregory Crumrine passed away in 1998.

19. Assistant Prosecutor Michael K. Cunningham passed away in 2011.

20. Plaintiff's counsel has no evidence suggesting Officer Crumrine committed a Brady violation and cannot obtain any evidence regarding same due to the deaths of Crumrine and Prosecutor Cunningham.

21. Counsel for Plaintiff and Defendants have met and conferred regarding Plaintiff's proposed amendments. Defendants oppose the amendments.

I certify that the foregoing statements made by me are true.
I am aware that if any of the foregoing statements made by me are
willfully false, I am subject to punishment.

RAINONE COUGHLIN MINCHELLO, LLC
Defendants, City of Long Branch and
Brian O'Gibney

By:



Frank J. Dyevoich, Esq.

Dated: March 20, 2023

EXHIBIT A

Mozer - Redirect

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1 REDIRECT EXAMINATION BY MR. CUNNINGHAM:

2 Q I'm going to hand you what's been marked S-16 and
3 S-17. I ask you to look at these two items, sir, you recognize
4 them?

5 A Yes, these are the contents of the material I brushed down
6 from the clothing of the victim.

7 Q Okay. So that's not something that was submitted to
8 you as a separate specimen?

9 A No, these, this contains the material that I removed from
10 the clothing.

11 Q Okay. Why are there two packages?

12 A One is 18 -- okay, 18 would be samples of the suspect's
13 head hair, and 14 and 15 would have been from the clothing.

14 MR. CUNNINGHAM: Thank you. I have nothing else.

15 MRS. SAUTER: Nothing further, Judge.

16 THE COURT: All right. Thank you, Mr. Mozer. You may
17 step down.

18 (Whereupon Mr. Mozer steps down.)

19 MR. CUNNINGHAM: Can I have one second, your Honor?

20 State calls John Nichols.

21 COURT OFFICER: Please state your name for the record,
22 and spell your last name.

23 THE WITNESS: John T. Nichols, N-i-c-h-o-l-s.

24 J O H N T. N I C H O L S, having been duly sworn, was
25 examined and testified as follows:

HARRELL 00627

Nichols - Direct

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1 DIRECT EXAMINATION BY MR. CUNNINGHAM:

2 Q Good afternoon, sir. Can you tell me where you're
3 employed, sir?

4 A The New Jersey State Police Laboratory, Sea Girt, New
5 Jersey.

6 Q In what capacity?

7 A I'm a principal forensic chemist.

8 Q What does that mean?

9 A I'm the bench level supervisor of the Biochemistry Unit.

10 Q Okay. What are your duties and responsibilities?

11 A I supervise a group of approximately five people, and we
12 analyze any specimens submitted by any law enforcement agency
13 under the counties that we service for various types of
14 evidence relating to biochemistry.

15 Q How long have you done that for?

16 A I've worked for the State Police Laboratory for a little
17 over twenty-one years.

18 Q Can you tell me what formal training and what
19 education you've had that qualifies you for that position?

20 A I have a Bachelor's Degree in physiology from Hunter
21 College, City University of New York, 1965. And I've had
22 extensive on-the-job training.

23 Q Have you ever been qualified previously as an expert
24 in forensic science in the State Courts of New Jersey?

25 A Yes, I have.

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HARRELL 00628

Nichols - Direct

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1 Q Can you tell me on approximately how many occasions?

2 A I've qualified as an expert witness in forensic science
3 three hundred and sixty-seven times in Municipal Courts,
4 Superior Court in all twenty-one Counties in the State of New
5 Jersey, and also in Federal Court.

6 MR. CUNNINGHAM: Your Honor, I'm going to be offering
7 this expert, this witness also as an expert for forensic
8 science.

9 THE COURT: Any questions concerning his expertise?

10 MRS. SAUTER: No, Judge, no objection.

11 THE COURT: Proceed.

12 Q Sir, are you familiar with a request for examination
13 which was assigned laboratory number 36967 E?

14 A Yes, I am.

15 Q How did you become involved with that request?

16 A This request was submitted by the Long Branch Police
17 Department in September, I believe it's 21, 1988. It was
18 assigned to the Biochemistry Unit on that day.

19 Q And when did you become involved with it?

20 A Shortly thereafter.

21 Q What did you do in connection with that request?

22 A The first item that was submitted to the laboratory on
23 9/21/88 was a tube of whole blood from the victim, which was
24 [REDACTED]. The blood was typed and a report was sent out.

25 Q What, when you say the blood was typed, can you tell

HARRELL 00629

5 Q There are four types of blood type?

6 A Correct.

7 Q What determination was made with respect to [REDACTED]
8 [REDACTED] blood type?

9 A [REDACTED] is a blood group O, and her Lewis type is A
10 negative B positive. That is the essence of the report.

11 Q What is a Lewis type, what does that mean?

12 A A Lewis type in conjunction with testing with saliva can
13 determine whether a person is a secretor or not.

14 Q What is a secretor?

15 A A secretor is a person, approximately 80 percent of the
16 population are known as secretors, these are people that will
17 secrete their blood group substances, in essence their blood
18 type in saliva, seminal fluid, vaginal secretions, any fluid
19 coming out of the body will contain these blood group
20 substances, if they are a secretor. And consequently to that,
21 20 percent of the population are classified as non-secretors.

22 Q Your determination was that [REDACTED] was type O and
23 a secretor?

24 A Correct.

25 Q What did do you next in connection with this

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PERMANENT, SATURDAY, 10/1/83 - LASER BOND A

Nichols - Direct

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1 laboratory number of request for examination?

2 A The report was then filed with a note stating that the
3 whole blood specimen number one will be analyzed further upon
4 the submission of additional specimens.

5 Q And were additional specimens later submitted?

6 A Yes, they were.

7 Q When?

8 A Additional specimens were submitted to the laboratory and
9 given the same laboratory case number on December 9, 1988.

10 Q And what was submitted at that time?

11 A There were approximately fifteen items submitted. The
12 first group of items is contained in a Sirchie rape kit, and
13 four articles of clothing.

14 Q Let me show you what's been marked as S-13 for
15 identification; can you tell me if you recognize this exhibit?

16 A Yes, I do.

17 Q What is that?

18 A This is a copy of our request for examination of evidence
19 submitted by the Long Branch Police Department.

20 Q And is that the specific request that you're
21 testifying about at this moment?

22 A Yes, I am.

23 Q What did you do in connection with the evidence that
24 was submitted at that time?

25 A The standard testing that was performed on the sexual

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HARRELL 00631

Nichols - Direct

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1 assault kit and on the clothing was conducted to determine the
2 presence or absence of male seminal fluid, any genetic markers,
3 and any blood group substances.

4 Q How did you conduct that testing, how was that
5 performed?

6 A Which, all of them you want me to go through?

7 Q Well, is it easier to do it by specimen?

8 A I can give you a general overall view of what is done.

9 Q That would be best.

10 A Okay. Under the Sirchie Sex Crimes Kit, there are three
11 specimens known as slide specimens, they are taken from three
12 cavities, oral, anal and vaginal.

13 Q Sir, I'm going to hand you what's been marked as S-1.
14 Do you recognize this?

15 A Yes, that's standard Sirchie kit.

16 Q And are you able to tell if this is the same kit that
17 was used in this case, or if it's a different one?

18 A It's the same one, based on the same laboratory case number
19 36967 E.

20 Q Okay. The slides that you're talking about, are they
21 contained in that exhibit?

22 A Yes.

23 Q Could you show them to us?

24 A Slides are contained in these three cardboard containers.

25 Q Okay.

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HARRELL 00632

Nichols - Direct

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1 A The slides are processed through a six stage staining
2 technique to emphasize a color of the spermatozoa that we are
3 looking for. The six slides are looked at under a compound
4 microscope at approximately the hundredth power.

5 The results of the testing of the three sets of slides are
6 as follows: The oral smears there were no spermatozoa
7 detected, the two anal smears there was no spermatozoa
8 detected. However, on the vaginal smears which are my
9 specimens 10 C, spermatozoa was detected.

10 Q What is spermatozoa?

11 A Spermatozoa is the male sperm that is contained in the
12 seminal fluid.

13 Q Is it produced in the female body?

14 A No.

15 Q What observations were you able to make of the
16 spermatozoa that you found on that slide?

17 A Just that they were present.

18 Q What else did you examine?

19 A There was a series of items that were examined by myself,
20 the genital swabbings, dried secretions, saliva sample,
21 fingernail scrapings, oral and anal, vaginal swabs, a nasal
22 mucous sample, slacks, a shirt, a pair of underpants and a
23 sweater. The method of testing is to determine whether a
24 chemical which is known as acid phosphatase is present on any
25 of the items that we test.

HARRELL 00633

Nichols - Direct

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1 It is a color indicative test, a piece of white filter
2 paper approximately nine centimeters across, which is about
3 four and a half inches, is wet with distilled water, and the
4 material that we're testing is just gently rubbed. The piece
5 of filter paper is then inverted and a chemical known as acid
6 phosphotasis agent is placed on the inverted filter paper. If
7 a purple color generates or is seen, a good indication of acid
8 phosphotase is noted. Acid phosphotase is contained in a very
9 large quantity in seminal fluid.

10 If there is a positive test here then the next series of
11 test are sequential. If we have a positive acid phosphotase
12 test, the next thing we have to look for is the presence or
13 absence of spermatozoa. If we do not find spermatozoa on the
14 slide where we have the first positive test, then we test for
15 a protein which is known as P30. This is indigenous to the
16 prostate gland, again, male characteristics.

17 Q That means it would not appear in the female?

18 A Correct. The next test, once we have at least an initial
19 test for acid phosphotase and either a positive sperm result
20 or a positive P30 result, in many cases where we cannot find
21 spermatozoa either through a lack of spermatozoa or medical
22 problem with the potential suspect, or low sperm count or
23 degraded spermatozoa we back it up with the P30 test. So,
24 again, test number one with combination of either test number
25 two for spermatozoa plus a test for the P30 will give us a

HARRELL 00634

Nichols - Direct

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1 positive for the male presence of seminal fluid.

2 If we get two positive tests here, then we have a gamut of
3 tests that go through numbers four through nine to try to
4 delineate whoever caused that seminal fluid.

5 Q And did you get two positive responses as part of your
6 testing in this case?

7 A Yes, we have positive responses on the vaginal swab and on
8 the underpants.

9 Q Okay. With respect to the vaginal swab, you found
10 presence of spermatozoa?

11 A Correct.

12 Q Were you able to make any observations or further
13 analysis with respect to that spermatozoa or its origin?

14 A Not to the origin of the spermatozoa per se, but to the
15 seminal fluid. The testing that was done was a test known as
16 absorption inhibition. This test will determine whether a
17 secretor deposited the seminal fluid or not.

18 In this case, the blood group substance detected was a H
19 factor, which is characteristic of somebody who is an O
20 secretor. However, three of the genetic markers that we tested
21 for, we did not receive any other reaction. This is on
22 specimen 10 of the vaginal swab. So, the only testing that was
23 performed, or the only positive tests on the vaginal swab was
24 for the presence of spermatozoa and blood group substance H,
25 which is characteristic of an O secretor.

HARRELL 00635

Nichols - Direct

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1 Q You say an O secretor, as opposed to an O
2 non-secreting person?

3 A Correct. As I explained initially, this person who
4 deposited the spermatozoa if you can link the H factor to the
5 spermatozoa, he would fall in that group of people which
6 approximate 80 percent of the population.

7 Q Eighty?

8 A Correct.

9 Q And also the H would indicate an O secretor, as
10 opposed to an A secretor or B secretor?

11 A Correct.

12 Q Or AB secretor?

13 A It would delineate to such that it is an O secretor.

14 Q Okay.

15 A On the underpants, which is my specimen number 14, the
16 results for spermatozoa were negative. No spermatozoa was
17 found on the slide that was made up by myself. However, the
18 results for P30 were positive.

19 So, we have the preliminary test, which is the acid
20 phosphatase was positive, a negative spermatozoa, but a
21 positive P30 test. Therefore, we continue the analysis on, to
22 attempt to obtain a blood group substance and any other genetic
23 markers.

24 The results of that testing was that the underpants also
25 reacted for a blood group substance H, which is indicative of

HARRELL 00636

Nichols - Direct

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1 an O secretor; however, the genetic markers of PGM and
2 Peptidase A, there was no reaction to those two tests.

3 Q And were you able to tell the blood type with respect
4 to the seminal material?

5 A Yes, the seminal material reacted for a group O secretor.

6 Q Did there also come a point in time when you made an
7 analysis of blood known to come from a Dion Harrell?

8 A I don't seem to have that report with me. I have two
9 copies of the first report, do you have a copy of the -- I'm
10 sorry, here it is. The date of the submission is obliterated,
11 this paperwork came off microfilm, but the report is dated
12 4/28/1989.

13 Q Let me show you what's been marked S-14, can you tell
14 me what that is?

15 A Yes, this is a copy of the identical request for
16 examination of evidence that I have. The date of the receipt
17 is March 23, 1989.

18 Q And the date of your analysis?

19 A The date of the final report is 4/28/1989, five days later.

20 Q Okay. And what did your analysis determine with
21 respect to Mr. Harrell's blood?

22 A The whole blood of Dion Harrell, which is my specimen
23 number 16, is a blood group O. Lewis type is A negative B
24 positive, which is indicative of a secretor. His saliva, which
25 is my specimen number 17, reaction for blood group substance H,

HARRELL 00637

Nichols - Direct

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1 which is consistent with a person who is an O secretor.

2 Q So, would he and [REDACTED] have the same blood
3 type?

4 A They have the same blood type, and they are both secretors.

5 Q Would Mr. Harrell's blood type be consistent with both
6 the spermatozoa and the seminal fluid that you found in
7 connection with this analysis?

8 A Mr. Harrell is a male. He is capable of generating
9 spermatozoa. So there is a link there. He is an O secretor.
10 The two stains found on the vaginal swab and on the panties
11 reacted also for a group O secretor. He is consistent with
12 those two characteristics.

13 Q You indicated earlier that 80 percent of the
14 population are secretors?

15 A Correct.

16 Q Can you break that 80 percent down further by way of
17 blood type?

18 A Yes. If you like, I can use the board.

19 Q If it would help you.

20 A There's four basic blood types, as I mentioned before, —
21 group O, group A, B, AB. Population wise, 40 to 45 percent are
22 O's, 40 to 45 percent A's, 15 to 20 percent are B's and then 3
23 to 5 percent AB's. In this situation, both the victim and the
24 suspect are O's, so they would fall in line with approximately
25 40 to 45 percent of the population.

HARRELL 00638

Nichols - Direct

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1 In this room here we would have, there's twenty people, 40
2 percent or 8 people would be O secretors, 8 people would be A
3 secretors, two people would be B and 1 percent would be AB.

4 And we take the secretor factor, which is 80 percent, we
5 multiply that by the lower numbers to make the numbers easier,
6 it would be 32 percent of the population, 32, is that 20 -- no,
7 that's 12 percent, and then approximately 1 -- 2.4 percent.

8 So, 32 percent of the population will fall into a group O
9 secretor, 32 percent of the population would be a group A
10 secretor, 12 percent would be a B secretor and 2.4 percent
11 would be a B secretor.

12 Q Beyond that, if we're dealing with a male, would that
13 affect the percentage?

14 A All right. If you're dealing with males, various females,
15 then based upon the population structure of the United States
16 or New Jersey, 51 percent I believe are females, 49 percent are
17 males. You make the numbers easier if you just divide them by
18 two. You have approximately 16 percent of the males would be O
19 secretors, 16 percent of the females would be O secretors.

20 Q Would there be any further limitations on the
21 population of, the percentage of the population capable of
22 being responsible for this spermatozoa?

23 A If you're talking about specifically spermatozoa then you
24 would have to exclude any prepubescent males probably under
25 the age of 11 or 12, which would be, I don't know, I can't

Nichols - Cross

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1 give you any numbers on that, and any males who cannot
2 generate sperm or have a very low sperm count, and anybody who
3 is impotent.

4 So that would reduce that 16 percent maybe by a factor of
5 one or two, possibly down to maybe 13 percent.

6 Q Any further limitations that you can tell us?

7 A Not based on this.

8 Q Thank you.

9 So it would be fair to say then, that the source of
10 the seminal material and the spermatozoa that you found in
11 connection with this investigation is capable of coming from
12 only 16 percent or less of the population?

13 A You have to factor in you will also that the person is an O
14 secretor. If you combine spermatozoa or seminal fluid, plus
15 the person is an O secretor, then those numbers would be valid.

16 Q And that would be consistent with Mr. Harrell's blood
17 type?

18 A Yes.

19 MR. CUNNINGHAM: I have no other questions.

20 THE COURT: Cross-examine.

21 MRS. SAUTER: Thank you, Judge.

22 CROSS-EXAMINATION BY MRS. SAUTER:

23 Q Mr. Nichols, you also combined fingernail scrapings,
24 did you not?

25 A Correct.

HARRELL 00640

Nichols - Cross

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1 Q Can you tell me what evidential value of examining
2 fingernail scrapings would have?

3 A Would you like the theoretical, or what we found?

4 Q Well, in this case you found nothing of evidential
5 value, correct?

6 A Correct.

7 Q But if you could explain to us for what purpose these
8 fingernail scrapings are taken specifically in the Sirchie Sex
9 Kit?

10 A The purpose there is a theoretical point for every item
11 that is utilized in the Sirchie Sex Crimes Kit. The people who
12 manufacture the kit, based on consulting with various types of
13 forensic people, feel that in a sexual assault there is a good
14 chance that the victim, whether it's male or female, under the
15 fingernails will either take skin or possibly hair or fibers
16 from the assailant.

17 Q And in this case, samples were actually taken from the
18 victim, correct?

19 A Correct.

20 Q And you did, in fact, examine them, correct?

21 A Correct.

22 Q And you did make a determination that there was
23 nothing of any evidential value there?

24 A Correct.

25 Q If you did find something there, whether it be hair or

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HARRELL 00641

1 skin or whatever, would it be fair to say that that would leave
2 another avenue open to a scientist such as yourself to conduct
3 a further examination and compare things to a possible suspect?

4 A Yes.

5 Q Now, in your testimony this afternoon, you mentioned
6 genetic markers. Can you explain to the ladies and gentlemen
7 of the jury what you mean by genetic markers?

8 A Okay. A genetic marker is that aspect of our biochemical
9 nature. Everybody is unique, except for identical twins, and
10 everybody has a number of genetic markers that distinguish you
11 from someone else. The genetic markers that we test for are
12 found in blood as well as in seminal fluid.

13 Q Now, is there not a test, that may be pretty bold of me
14 to say state of the art with respect to scientific analysis at
15 this point, but that's how I'm going to characterize it, a DNA
16 test?

17 A Yes.

18 Q And is a DNA test not -- isn't it more specific than
19 the type of testing that was done in this case?

20 A If the testing itself theoretically can, probably depending
21 upon which book you read or which newspaper report you read,
22 generates statistics much bigger than the ones that I just put
23 on the board. It's fairly sophisticated, you need -- in some
24 cases when it first started, you needed a lot of sample, but
25 the technology is so rapidly advanced that now you just need a

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Nichols - Cross

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1 minute sample.

2 Q And would it be fair to say that if DNA testing was
3 done in this case on the samples taken from Mr. Harrell, taken
4 from the victim and taken from the victim's clothing and
5 everything else that you obtained from the hospital, that more
6 specific information could have been obtained in this case?

7 A If the test came out, more specific information could have
8 been detailed.

9 Q And with that more detailed information, you would
10 then be able to possibly conclude with a strong degree of
11 scientific certainty that a particular suspect was the person
12 who committed the crime, or was not the person who committed
13 the crime, correct?

14 A That's correct.

15 Q And this DNA testing was in existence back in 1988,
16 was it not?

17 A As far as I know, the FBI went on line in January of '89, I
18 believe, and I believe some private industry was involved with
19 DNA testing.

20 Q And if the FBI went on line in 1989, that was still
21 prior to your examination of the exemplars in this case,
22 correct?

23 A I think this, the initial report is dated September '88,
24 the final report is 1/23/89, and then the whole blood from the
25 suspect, I believe which is subsequent to that. So this report

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PENSACOLA COUNTY, FLORIDA

HARRELL 00643

Nichols - Cross

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1 was generated approximately the same time the FBI went on line.

2 Q And when you examined specimens that are submitted to
3 you, there's procedures that you follow in your laboratory with
4 respect to preserving those samples, correct?

5 A Correct.

6 Q And would it be fair to say that in light of the way
7 you preserve your samples and refrigerated the blood and things
8 like that, that there was available to the State of New Jersey,
9 a procedure whereby more accurate and thorough and detailed
10 testing could have been done sometime between January of 1989
11 and May 14 of 1992, correct?

12 A If there was enough sample left over.

13 Q And that would have to determine, would have to have
14 been made by a scientist such as yourself?

15 A Correct.

16 Q Is the New Jersey State Police Lab in Sea Girt where
17 you're located currently, equipped to do such a DNA test as you
18 described?

19 A No, we're not.

20 Q In light of your experience in these matters, would
21 you agree that should a submitting agency in the State of New
22 Jersey, whether it be a local municipality or a Prosecutor's
23 Office or the Attorney General's Office, when they need such a
24 test done the FBI Lab is available to them, is it not?

25 A We have been used as a screening laboratory for cases that

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PERGAS CO DAYMARK, 34 0702 LASER B'D/A

HARRELL 00644

Nichols - Cross

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1 have either gone to a private agency or to the FBI, we will
2 just give them, say you do have a positive spermatozoa, because
3 with testing for DNA, you have to have a large quantity of
4 spermatozoa. So it's usually us that screens the case for a
5 specific submitting agency, and then we will say, well, it's up
6 to you if you want to submit it to somebody else.

7 Q Would it be fair to say that no one involved in this
8 case asked you to do that?

9 A Correct.

10 Q And these statistics that you've been so gracious to
11 explain for all of us are basically statistical probabilities
12 only, correct?

13 A Correct.

14 Q And would it be fair to say that these are
15 generalities that are only as good as the current state of
16 statistics?

17 A Correct. That's why I gave sort of a caption 40 to 45
18 percent, that they vary in different studies, but not by
19 usually more than 4 or 5 percentage points.

20 Q And based on the statistical probabilities that you
21 placed on the board today, Mr. Harrell is basically in the
22 majority of the population, is he not?

23 A What do you mean by majority?

24 Q Well, he's an O type secretor, correct?

25 A Correct.

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HARRELL 00645

Nichols - Cross

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1 Q So that places him in that general population 40 to 45
2 percent secretor population of about 32 percent male secretor
3 population of about 16 percent?

4 A All right. Those numbers would also correspond to somebody
5 who's a group A secretor also.

6 Q But he's not, I mean --

7 A He's not unique.

8 Q By any stretch of the imagination?

9 A I'm an O secretor, so I would fall right within the same
10 statistical representation.

11 Q And it would be fair to say that if, when only dealing
12 in statistical probabilities, that if you found Mr. Harrell to
13 be a type AB secretor, and that that's the type of material you
14 found on the samples from the victim, that he would be in a
15 very, very minute percentage of the population, correct?

16 A Correct.

17 Q And would it also be fair to say that in no way, shape
18 or form are you trying to give the jury the impression that
19 because Mr. Harrell is an O secretor that there is a good
20 chance that he is the one who actually committed this assault?

21 A I'm saying that Mr. Harrell would fit the statistical
22 representation of those people who could contribute to that
23 stain. I'm not, in other words, I'm not excluding him. If
24 Mr. Harrell was a group B or a group A, I would be here saying
25 he could not have caused that stain. I'm only including him in

HARRELL 00646

Nichols - Redirect

88

1 that number of people who could have caused that stain.

2 Q And that is a wide range of the population, correct?

3 A Yes, it's 16 percent of the male population.

4 MRS. SAUTER: I have nothing further, Judge. Thank
5 you very much, Mr. Nichols.

6 REDIRECT EXAMINATION BY MR. CUNNINGHAM:

7 Q You're somewhat familiar with DNA?

8 A Somewhat.

9 Q If we're dealing with DNA, would we also, or would we
10 still be talking about statistics?

11 A Yes.

12 Q We'd be using numbers?

13 A Yes.

14 Q Smaller numbers?

15 A Much smaller.

16 Q But numbers?

17 A Yes.

18 Q That 16 percent of the population, what you've done is
19 you've excluded 84 percent of the population; is that correct?

20 A It's 16 percent of the male population who are O secretors.

21 Q Is that across the board male population, regardless
22 of race?

23 A The difference between white and black are within
24 statistics over there.

25 Q So that 16 percent includes whites and blacks?

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HARRELL 00647

Nichols - Redirect

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1 A Yes.

2 Q And Hispanics?

3 A Across the board.

4 Q Everybody. If I were to tell you that the source of
5 the seminal material and the spermatozoa that you detected in
6 this case was from a black male, would you be able to refine
7 that number any further?

8 A I have no way of knowing that, based on my testing, that it
9 is from a black or a white.

10 Q I understand that, but if I were to tell you that it
11 was a black male, even though you can't determine that from
12 your testing, would you be able to break that number down
13 further?

14 A Then you would have to take that 16 percent of the male O
15 secretor population and multiply it by the number of blacks
16 percentage wise in the country, which is approximately 12
17 percent.

18 Q Which would tell us what?

19 A Well you'd have to multiply 12 percent times 16 and come up
20 with --

21 Q So it would be 12 of 16?

22 A Well, it would be 12 percent, not --

23 Q 12 hundredths of 16?

24 A We're dealing with maybe --

25 Q I can't do the numbers, can you?

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Nichols - Redirect

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1 A Well, I used to be able to do them.

2 Q I'll give you a pen and piece of paper.

3 A If somebody has a calculator, maybe we get this over with.

4 Q The Judge is ahead of us.

5 A Probably about two percent, I would say.

6 THE COURT: .193.

7 THE WITNESS: Two percent.

8 THE COURT: Two percent.

9 Q And let's say, if in addition to telling you that the
10 donor was black, if I were to give you a physical description
11 in terms of height, weight, age and build, would you be further
12 able to limit that 1.97 percent of the population?

13 MRS. SAUTER: Objection, Judge, I don't think
14 secretor --

15 THE COURT: We're in expertise, and we're talking math
16 now, which is better an argument made to the jury in summation.

17 MR. CUNNINGHAM: I have no other questions.

18 MRS. SAUTER: I have nothing further, Judge, thank
19 you.

20 THE COURT: All right. Thank you very much,
21 Mr. Nichols.

22 THE WITNESS: Thank you.

23 (Whereupon Mr. Nichols steps down.)

24 MR. CUNNINGHAM: Judge, subject to offering certain
25 exhibits and physical evidence, the State will rest at this

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HARRELL 00649

EXHIBIT B

1 THE COURT: All right. You can step down. Thank
2 you.

3 (Mr. Hendrix steps down from the witness stand.)

4 MRS. SAUTER: Defense rests, Judge.

5 THE COURT: All right. Is there any rebuttal?

6 MR. CUNNINGHAM: No, sir.

7 THE COURT: Are we ready for summations?

8 MR. CUNNINGHAM: State's ready.

9 MRS. SAUTER: Yes, Judge.

10 THE COURT: All right.

11 MRS. SAUTER: Thank you. Judge Labrecque,
12 Mr. Cunningham, Mr. Harrell, good morning, ladies and
13 gentlemen.

14 Now is basically the time when Mr. Cunningham and I
15 are permitted to speak with you and basically argue our
16 respective positions to you based on the testimony that you
17 heard over the last couple of days.

18 I will point out from the beginning it's not a
19 debate. Once I sit down, that's it. And I did make some
20 notes. And as you were told by Judge Labrecque in the
21 beginning, if anything I say does not match up with your
22 recollection of what the testimony was, you must go with your
23 own recollection. And I expect you to do nothing less.

24 However, I made notes because, like I said, when I
25 sit down I can't stand back up and speak with you again. And

~~Sauter summation~~

7

1 I can't rebut anything that Mr. Cunningham is going to say to
2 you. So I'm going to try and get it all into one issue now.

3 You heard talk before you heard the standard of proof
4 beyond a reasonable doubt. And you were told both by
5 Mr. Cunningham and myself that the State doesn't have to have
6 a perfect case. It's not a puzzle where you have to have each
7 interlocking piece match exactly. That's not what the
8 standard of beyond a reasonable doubt means.

9 However, on another hand, although proof beyond a
10 reasonable doubt is not an insurmountable standard, there has
11 to be sufficient proof before you where you can take the
12 evidence that you heard, apply your common sense, your very
13 different backgrounds and logically come to a conclusion. And
14 the conclusion that the State is going to ask you to draw in
15 this case is that Mr. Harrell is guilty of committing a sexual
16 assault upon [REDACTED] back on September 18th of 1988.
17 And basically Judge Labrecque is going to tell you what the
18 elements of the offense are. What the law is. And in this
19 case, in order to convict Mr. Harrell, you're going to have to
20 find certain things. You're going to have to find, one, that
21 there was a sexual assault upon [REDACTED] on the day in
22 question. You're also going to have to find that that assault
23 upon her was committed with some sort of force or coercion.
24 And lastly, you're going to have to find that Dion Harrell is
25 the person who actually did assault her on that day.

HARRELL 00783

~~Sauter-summation~~

8

1 And the main thing that I am going to argue to you
2 this morning is it's Mr. Harrell's position that it was not he
3 who committed this assault.

4 He testified. He has no requirement to testify. But
5 he did testify. And he told you that from about five until --
6 between eight or nine or so he was playing basketball at
7 Van Court Park. And he remembers being there with
8 Detective King and with a number of other individuals.

9 He advised you that after the game was over he stayed
10 at Van Court Park, spoke with a number of the individuals and
11 one of them gave him a ride home. He said he arrived home
12 somewhere in the vicinity of ten or 10:30, went right into his
13 home, proceeded to take a shower, change his clothes. He
14 wanted to go see some people in another area of Long Branch
15 and that his mom and his sister implored him to take his
16 three-year-old nephew with him because it was a hot, muggy
17 night and he couldn't sleep too well. And he was also
18 somewhat excited about Dion having promised to take him on a
19 bicycle ride earlier in the day.

20 And then he tells you that he took his nephew on his
21 bicycle over to the other area of Long Branch where he stayed
22 with Reginald Hendrix and a couple of other people and then he
23 came home. And as he was driving home he saw Rebecca Durant,
24 who also testified. And she made a comment to him Dion or
25 Dobie, whatever words she used, get that little boy home.

HARRELL 00784

~~Butter summation~~

9

1 It's late. That is the crux of what he's telling you he
2 remembers happening that day.

3 His sister testified, his mom testified, Reginald
4 Hendrix testified and Detective King testified. And I think
5 Detective King was quite honest with you. He said I don't
6 specifically recall that day. He said I remember playing
7 basketball. I remember playing basketbal with Dion during
8 that time. Played with him a lot. Game's normally over at
9 dusk if it's a nice day.

10 But he had brought before you to do testify to more or
11 less start the corroboration of Mr. Harrell's version of where
12 he was that night. Not that he could pinpoint specifically
13 where he was specifically on the date but to lend credence to
14 the fact that Dion was telling you the truth that he did play
15 basketball then, because he is corroborating during the time.
16 That's exactly what's happening.

17 Now, I think you can draw a little bit further
18 inference from Detective King's testimony because you heard
19 other police officers' testify. And even though this is
20 almost four years ago, those other officers were able to
21 refresh their recollection of what happened due to the fact
22 that they write police reports. And they do it for a specific
23 purpose. To be able to recall and to accurately reflect what
24 transpired on a given date because whether it's a criminal
25 trial or an auto accident or any of the other calls that they

~~Gauter summation~~

10

1 happen to take in the course of their duties. Things do get
2 aged before they come to a jury in many circumstances. And
3 you can see that the other officer's testimony was more -- I
4 know I did this, I know I did this, I know I did this.
5 Detective King, acting in his personal capacity, not on duty
6 when he was playing basketball. And he said to you, I believe
7 from the witness stand, I didn't take any notes. You know.
8 He tries to keep work over there and I was having fun. This
9 is my recreation. I didn't take notes. So I can't go before
10 fourteen people on a jury and say, yeah, I know for sure that
11 that's what happened that day.

12 In light of that, I think you can see how
13 Mrs. Harrell, Dion's mother, and his sister, LaChristie, could
14 have some inconsistencies in what they were telling you. They
15 didn't write this down, either. They're going from their
16 recollection. I think if you use your common sense and your
17 background you realize that, if anybody said to you where were
18 you, say, March 19th of 1992, you'd have to sit there for a
19 moment and think and try and reconstruct.

20 If they asked you today where you were in September
21 of '88, unless something major happened in your life, you'd
22 have to sit back and think. And if you were with family
23 members, maybe their recollection of specific times would not
24 be one hundred percent in accordance with your own.

25 That doesn't even mean either you or your family

HARRELL 00786

~~Sauter summation~~

11

1 remember would be lying and not telling the truth. It's just
2 this is what happens when you get further and further away
3 from an incident. On the other hand, if something happened to
4 you, it would be more likely to stick in your memory.

5 In that type of a common sense kind of a vein, it's
6 almost ironic when you're talking about three and-a-half,
7 almost four years ago, that if somebody said to you where were
8 you on September 18, 1988, I could specifically tell them.
9 The reason I could is I happened to get married the day
10 before. I know exactly where I was. I don't have to write it
11 down.

12 But if you asked, say, one of the guests at the
13 reception where were you, they'd have to go back and think.
14 And they might have to make a few phone calls to figure out
15 where they were. It doesn't mean that they're lying. And I
16 ask you to take their testimony in that vein.

17 Now, for LaChristie, Dion's sister, she's saying,
18 well, I think Dion was playing basketball on a Wednesday and I
19 think he got arrested on a Sunday. And you probably don't
20 know from all the other testimony you've heard she's got the
21 date -- not the date but the days backwards. He was playing
22 basketball on a Sunday when he got arrested on a Wednesday.

23 Does that make her a liar? No. She also said -- and
24 I think you can realize from being able to observe her
25 testimony -- she got a little confused, because on

~~Sauter summation~~

12

1 cross-examination she's saying, well, no, he was playing
2 basketball the day he got arrested. That doesn't even make
3 any type of logical sense to anybody. And that's what I was
4 trying to bring out with her. That if she is testifying
5 before you ladies and gentlemen that she knows her brother got
6 home -- is it 10:30, something to eleven, I think she said,
7 and then he took her nephew (sic) and came back at 12:30, one
8 o'clock the following morning, it's logically impossible for
9 Dion to have been arrested that day. Okay? So I don't think
10 you should look at her in a very technical type of sense. You
11 have to make allowance for the fact that she does get
12 confused. That's about all I could say.

13 Again, the mother, Diane Harrell, she basically says
14 I know Dion was in the house from 10:30 'til about ten minutes
15 of eleven, when I took these two girls that were visiting,
16 friend's kids, back to Red Bank. And she also confirmed like
17 Dion was out with the nephew on the bicycle and came back
18 sometime much later that evening because she fell asleep. And
19 then Dion and I think his sister were getting a little loud in
20 the house and woke her up. And she doesn't remember what time
21 it is.

22 But what is being told to you is we're talking about
23 sometime -- an offense happening sometime between 10:30 and
24 10:50 at night. Somebody knows where Dion Harrell was in that
25 period of time other than only Dion Harrell. And he is under

HARRELL 00788

~~Sauter summation~~

13

1 absolutely no obligation to either speak with you or to call
2 in witnesses. But he chose to do that. And his witnesses
3 came in and testified, even though their stories don't
4 interlock one hundred percent. That's what happens when you
5 deal with human beings.

6 On the other hand, I would say to you if their
7 stories came in, I think maybe even the Prosecutor will bring
8 this out, if they were pat stories, all the way down the line,
9 I think the State would probably have a good argument to say
10 to you, ladies and gentlemen, because almost word-for-word the
11 grandmother, the child's mother, the defendant, they all came
12 there and said exactly the same thing. Their times matched
13 exactly. Treat that as suspect.

14 But that's not what happened here. I think these
15 people were get being very honest with you. They might have
16 been a little frightened but they were being honest.

17 Dion also brought in Reginald Hendrix, who just
18 testified. Does his time exactly match No. He says my
19 recollection is, not having written this down, that Dion got
20 to my house a little bit before ten, because I know I had to
21 get to the liquor store before ten o'clock and I borrowed his
22 bicycle. But he was with his nephew. He stayed until about
23 12:30 the next morning with the nephew.

24 Unless you throw out Dion's testimony, his mother's
25 testimony, the sister's testimony and Hendrix's testimony and

~~Sauter summation~~

14

1 called them all liars, somebody was with Dion Harrell at the
2 time that this offense allegedly occurred.

3 Now, when Judge Labrecque tells you what the law is,
4 one thing he's going to say is, ladies and gentlemen, if you
5 feel that someone has some sort of an inherent prejudice in
6 this case, in that they -- you find that they have a motive to
7 lie, that they have an interest in the case, that they're
8 biased one way or another, you can use that in your
9 deliberations to affect the credibility.

10 I'm going to suggest to you now that I do not believe
11 when the twelve final jurors went into the jury room that you
12 should go in and say, well, let's start out as suspecting Dion
13 Harrell's testimony because he's the defendant here. I'm
14 going to ask you not to do that for a simple reason. Yes,
15 he's a defendant. But technically I guess you could say he
16 does have an interest in the outcome of the case. Every
17 criminal defendant would have an interest in the outcome of
18 the case.

19 That doesn't mean they're lying, because if you look
20 at his testimony in that vein, because he is a criminal
21 defendant, then every criminal defendant who testifies, who
22 elects to testify, could go into the jury room with three
23 strikes against them at least. But every defendant's
24 testimony is suspect.

25 I don't believe that that should be the case and I

HARRELL 00790

~~Sauter summation~~

15

1 would ask you specifically not to do that in this case,
2 because I don't think any one of you, if it was yours or if it
3 was a family member or a close friend who was accused of a
4 crime and went to trial and testified, you wouldn't want the
5 jury in that case to go in with three strikes at least against
6 that person, especially if you believe him.

7 Now, if we look at the flip side of this case, how
8 has the State shown to you beyond a reasonable doubt that
9 Mr. Harrell was the person who attacked [REDACTED]? My
10 position is they have not done that. And I'm going to
11 highlight a few reasons why they have not done that.

12 One, the victim comes in. I think you would all
13 agree that what happened to [REDACTED] was terrifying.
14 She even said it herself. She's never been so frightened
15 herself before in her life. And it's something very, very
16 major in her life. Seventeen and-a-half years of age. I
17 can't think of anything more traumatic than being raped at her
18 young age. And I think you would expect in that circumstance
19 that she would recollect even the most minute details.

20 In this case, she tells you -- she tells you she
21 doesn't know a lot of things. She didn't know what age she
22 told the police her attacker was. She didn't remember whether
23 the officer who assisted her for about almost three hours,
24 that being Detective Ann Samuels, it was a male or female.
25 She didn't recall after this attack took place that she told

HARRELL 00791

~~Sauter summation~~

16

1 the police that she met up with an unidentified black male on
2 the street and asked him did you see that guy who just ran by
3 here. She didn't remember that at all.

4 As a matter of fact, she doesn't recall most of what
5 happened to her that night. But the only thing she's sure of,
6 the only thing she was definitely positively sure of in this
7 courtroom was when Mr. Cunningham said can you identify the
8 person who attacked you, she said yeah. Him. And she pointed
9 to Dion Harrell.

10 I truly wonder if Mr. Harrell chose to sit back here
11 rather than at counsel table or if he was among a few of his
12 friends back here she could point him out. She knows that she
13 described to the police a young black male, clean-shaven,
14 skinny, who she saw in McDonald's on one occasion three weeks
15 prior.

16 Well, if she can't remember anything else, I don't
17 know how she can remember him, because I don't honestly
18 believe she got a real good look at this person.

19 You have to remember, and I think the diagram that
20 Detective Samuels drew is in evidence, she drew a corner of
21 Broadway and North Fifth, Perry's Trophy Shop, and then a lot
22 that goes about seventy feet back. She put street lights out
23 on the street. And she also tells you the attack took place
24 way in the back of the lot, because the defendant took her
25 there, had to search the area with a flash light. It's very

HARRELL 00792

~~Gauter summation~~

17

1 dark back there, I would assume, because nobody ever said in
2 this courtroom, so you can't assume that any of the lights
3 from that McFadden Motors was on or anything else. You have
4 to assume it was dark, because that's the only logical
5 inference you can draw when you're not told anything about it.
6 And she just -- she varies a lot.

7 But what is of significance she tells you this person
8 came, and I think she showed you, put an arm around her neck
9 this way. She started to scream. He covered up her mouth.
10 And, her words, he dragged me, he pushed me, he shoved me on
11 to the ground. He dragged me seventy feet, by
12 Detective Samuels estimation, by the neck, to the back of that
13 lot.

14 And the problem that I'm having, I would argue to
15 you, that should weigh in your consideration of her testimony
16 is the testimony of Dr. Louis. Dr. Louis came in and said he
17 did a head-to-toe on her. I looked at her. I didn't see one
18 cut, one bruise, one abrasion. Nothing. Absolutely nothing.
19 I think anybody who has been dragged seventy feet by the neck,
20 thrown to the ground, pushed into a fence and shoved into the
21 ground during an attack, on asphalt, is going to have some
22 physical sign of that type of an attack. You don't come out
23 of that unbruised. It is nearly impossible.

24 So basically Dr. Louis says in very simple terms, this
25 young girl did basically have sex with somebody. Who we don't

~~Sauter summation~~

18

1 know. He's not medically able to determine. But there's
2 nothing else on her at all.

3 Also what I find a little odd about her assertion of
4 what happened is she says she runs home, she tells her mom.
5 And I believe most of you have children. And I think all
6 parents would want to trust that if something awful happened
7 to their child, the child would come to them and then tell
8 them. And I think that you would feel immediate compassion
9 for a child who has had something like that happen. But Cynthia
10 Abbott says to you I told my mother and there was like no
11 reaction from her mother. She didn't even call the police.
12 Cynthia Abbott herself called the police.

13 There's something missing here. Something wrong.
14 Something not in accordance with human experience, logic,
15 common sense. And the reason I mention all these other
16 factors is because if you find that there are suspicions in
17 her testimony, that should affect her credibility with you.
18 That should affect your determination as to whether or not her
19 ultimate conclusion in this case, that is, Dion Harrell was my
20 attacker, is also subject to suspicion.

21 She also says to you, she told the police, I saw him
22 one other time in McDonald's three weeks ago. Well, Dion
23 himself tells you, nobody contradicts, he lives right across
24 the street from McDonald's. He works at another McDonald's
25 and he's always in the McDonald's.

HARRELL 00794

~~Sauter summation~~

19

1 If he wanted to lie to you, too, he would actually
2 come and say, ladies and gentlemen, I never once saw [REDACTED]
3 [REDACTED] Never set foot in McDonald's. Does he say saying?
4 Yeah. I seen her in McDonald's. She's taking my order.

5 Something's not right here. If she can't remember
6 whether or not it was a male or a female officer who drove her
7 to the scene of the crime, went over the crime scene and took
8 her to the Monmouth Med, who stayed with her for a while, she
9 can't remember if it's male or female with that, how can she
10 be so sure of somebody she saw three weeks ago in McDonald's
11 three weeks ago one time? She must, in that busy area of
12 Long Branch, deal with many, many, many people.

13 The other thing that seems a little odd. She had
14 gone through this traumatic of an experience. She's back at
15 work three days later? I don't know. That -- more or less
16 I'm throwing that out to you as something to consider. I'm
17 not so sure that a young girl who went through something like
18 that as she attempts to portray it in a courtroom would just
19 be emotionally capable of going back into McDonald's where she
20 allegedly saw her attacker three weeks ago and just continue
21 working like nothing's going on.

22 Now, with respect to the arrest of Dion Harrell, she
23 says I saw him. I called the police. The police showed up
24 and arrested him. And then there's identification down at
25 police headquarters.

HARRELL 00795

~~Sauter summation~~

20

1 Now, on cross-examination of Dion Harrell, the
2 Prosecutor says, well, you're taking the jacket off before or
3 after the police got there. I think that the State wants you
4 to infer that not only did Dion Harrell see the girl he
5 attacked, acknowledged that he was the attacker, saw her run
6 to the phone, was smart enough to try to put two and two
7 together and say, gee, she must be calling the cops. If she's
8 going to call the police, she's going to identify me by the
9 white leather jacket I have on. And, boy, I better get it off
10 of me. I don't see that.

11 When Dion was being cross-examined, this is one thing
12 I do direct your attention to. It's a little bit of an aside.
13 There's a lot of questions about whether or not he read his
14 Grand Jury transcript. That shows you he did testify before
15 the Grand Jury. No problem with that. Do not, please do not
16 draw the inference that Dion Harrell was doing anything wrong
17 in reading that Grand Jury transcript, because he was not.
18 And any inference that you may have derived from the State's
19 questions I think would be wrong.

20 It's not improper. It's not unethical. It's not any
21 of those things. And I don't suspect for a minute that any of
22 you people thought the police officers didn't come in here
23 after having reviewed the police report. And to be quite
24 honest, I didn't even ask them questions like that. I just
25 kind of assume that they'd look at their police reports. It's

~~Sauter summation~~

21

1 foolish to infer that they'd look at their police report.

2 And take Ann Samuels, for example. She was asked what
3 specific descriptions did [REDACTED] give you the person
4 who attacked her. And she said may I please refer to my
5 report. Nobody had a problem with that. She referred to her
6 report. Patrolman O'Gibney referred to his report. The
7 doctor referred to the emergency room report. There's nothing
8 improper about that.

9 But in that Grand Jury transcript, basically the only
10 thing that was elicited from that was that Dion Harrell did
11 not remember today that he saw [REDACTED] go toward the
12 telephone. That's all. There's no testimony that he
13 overheard what she was saying, that she was making any
14 gestures, pointing to him or looking at him excitedly or doing
15 any of those things to give him any knowledge of why she was
16 on the phone or that the police were going to show up. So I
17 ask you that you not draw that conclusion.

18 But what is of particular note is Patrolman O'Gibney
19 says to Dion Harrell I got to take you downtown. I got to
20 take you to police headquarters. And the defendant says okay.
21 Well -- and Patrolman O'Gibney, he tells him what he's being
22 arrested for.

23 Dion tells you he started crying. He was twenty-one
24 years old at the time. And he told you he's charged with
25 basically, in simple terms, raping somebody? He starts to

HARRELL 00797

~~Gauter summation~~

22

1 cry.

2 And there was a specific reason that I asked
3 Patrolman O'Gibney did you know Dion Harrell from other
4 capacities. He says I play basketball with him. And he
5 basically told you he was a nuisance in Long Branch on
6 juvenile matters. He's had contact with him before. And even
7 he described it as being odd. That when Dion was in
8 headquarters, that he was acting differently and he was
9 speaking to the detectives. And from the moment of his arrest
10 he was asserting his innocence. I didn't do it. I didn't do
11 it. Is the girl here that's accusing me? I want to see her.
12 And Patrolman O'Gibney said that's odd. That's real odd. And
13 use your common sense. Why? If you had done something like
14 that, something serious and somebody just pointed you out and
15 said that's the person, why would you want to insist that you
16 have another face-to-face confrontation with this person?
17 Show the girl to me. Show me to the girl. Show the girl to
18 me. I didn't do this. Why is she saying this? And I think
19 Patrolman O'Gibney said they more or less tried to tell him
20 you're crazy. You're crazy for insisting on this. No. No.
21 I want to. I want this girl to see me because she's got to be
22 wrong. And the girl says, according to Patrolman O'Gibney, in
23 a cold deliberate manner, that's him.

24 Now, yeah, his recollection on that respect is
25 different than Dion, because Dion said how I remember her

HARRELL 00798

~~Sauter summation~~

23

1 sitting there paying more attention to her mom and just
2 looking up real briefly and saying, yeah.

3 But then again it's a difference of recollection.
4 And there was a -- I don't know quite how to describe it. A
5 little bit of a broken battle between Mr. Cunningham,
6 Mr. Harrell and Mr. Cunningham wanted Mr. Harrell to say,
7 yeah, I think that Patrolman O'Gibney's lying. Quite
8 honestly, their recollections are different.

9 But you do have before you the testimony of
10 Patrolman O'Gibney that the girl did state in a cold,
11 deliberate matter, that's him. But you also have over the
12 last question that was asked of Patrolman O'Gibney, and I said
13 to him inasmuch as you describe [REDACTED] speaking in a
14 cold deliberate manner, would you also say that Dion Harrell
15 at the time of his arrest adamantly maintained his innocence?
16 And he said yes; he did.

17 This is not some story that's been concocted over the
18 last three and-a-half years. If it was, then Dion was pretty
19 smart right from the beginning. Right from the getgo, because
20 the story has not changed. The story was the same before the
21 Grand Jury. It was the same, according to the detectives, the
22 date of his arrest. And there really aren't too many
23 inconsistencies. As a matter of fact, I think the Prosecutor
24 found two in the huge Grand Jury transcript.

25 Now, what else could the State have done to solidify.

~~Sauter summation~~

24

1 their case to you? Well, exemplars were taken from the victim
2 in the hospital. Samples were taken from Dion Harrell quite a
3 period of time later. But the samples were still good. And
4 they compared hairs. And I think it was Mr. Moser who did the
5 hair samples. And he said, well, we didn't find any hairs
6 that were not the victims on any of the victim's property.
7 Any of the clothing.

8 Well, I would suggest to you, in light of this
9 testimony, that when there is close body contact, as in a
10 sexual assault between two individuals, the likelihood that
11 hairs are going to be transferred from one person to another
12 are not. It did not happen in this case. They found the
13 victim's hairs.

14 Then we get to Mr. Nichols. And Mr. Nichols did, oh,
15 the blood work and a few other things. Now, the blood shows
16 that the victim and the defendant have the same blood type.
17 They're both O. They're both secreters. That puts the two of
18 them in the forty to forty-five percent population range, that
19 being the majority of the population. And for as much as
20 anybody's going to ask you to extrapolate down and say, well,
21 okay, separate the forty percent by two to get males and
22 females, we're down to twenty percent and take eighty percent
23 of that, which would bring it down to sixteen percent for
24 males in the population who are type O blood and are
25 secreters, it's still the majority, because I think that

HARRELL 00800

~~Sauter summation~~

25

1 diagram was also marked into evidence. And you see if Dion
2 Harrell had a very -- had a blood type that was minute in the
3 population, you could get down to .002, I think, by the time
4 you extrapolate it down. But no matter how much
5 extrapolation, he's still in the majority.

6 Now, once they have that, well, is there anything
7 more that could be done to substantiate [REDACTED] claim
8 that Dion Harrell is her attacker? Well, the F.B.I. went on
9 line in January of 1989, three months after this crime, with a
10 DNA test available to any and all law enforcement agencies in
11 the country. DNA tests finds specific genetic markers which
12 is a much more scientific, state-of-the-art test than what the
13 State Police Lab did.

14 Basically the State Police labs results are
15 inconclusive. They don't tell you anything. They tell you
16 basically that [REDACTED] had sexual relations with
17 somebody who's a type O secreteer. That's it. They could have
18 gotten much more specific and either pinpointed or exculpated
19 Mr. Harrell.

20 And ladies and gentlemen, we don't have an obligation
21 to do that test. Dion Harrell's not to be put to the expense
22 of doing the test. It's the State's obligation to prove this
23 case to you. I suspect they could have done a lot more and
24 they did not do that.

25 Additionally, fiber evidence. Mr. -- I think it was

~~Sauter summation~~

26

1 Mr. Moser or Mr. Nichols tells you the clothes are scraped
2 down, first examined microscopically, also with the naked eye.
3 They're scraped down and fibers, dirt, anything else is
4 removed from that on white paper. I said, well, did anybody
5 happen to tell -- I mean you saw the victim's clothes. Green
6 and white cotton, dark green pants, and a light green sweater.
7 Her attacker had on a red sweatshirt.

8 Well, did anybody ask you to look at those fibers?
9 Did anybody bother to tell you what the alleged assailant was
10 wearing? No. Nobody told you. We can't compact all the dirt
11 and fibers and everything we got. Never analyzed it in three
12 and-a-half years. The State did not have that analyzed to see
13 was there a red fiber or not.

14 Did they -- in light of the description and the
15 identification three days later, did they knock on
16 Mrs. Harrell's door? Did they get a search warrant? Did they
17 go to her house with a search warrant and say, Mrs. Harrell,
18 we have your son under arrest. He's identified for a sexual
19 assault. It happened three days earlier. We're coming in.
20 We're looking for a pocketbook or any other proceeds of the
21 alleged theft from the victim. We're looking for a red
22 sweatshirt. We're looking for white sneakers. We're looking
23 for jeans. Did they do that? No. Could they have? It's up
24 to you to draw that conclusion.

25 I don't think this case was properly investigated at

~~Sauter summation~~

27

1 all. Not only an improperly investigated case. The State
2 wants you to convict Mr. Harrell on one simple I.D.

3 It's frightening. Real frightening. A lot more
4 frightening than if you were sitting in this seat. It's
5 actually frightening. Absolutely frightening.

6 The last thing I really wanted to say to you ladies
7 and gentlemen is I also hope that you don't draw any adverse
8 -- this is almost a given. I don't suspect you will. Don't
9 draw any adverse inferences and say, gee, this family who came
10 in here and testified for him, there his good buddies. If you
11 had to claim an alibi, obviously it would be people who you
12 knew, because if you were out on the street somewhere or on a
13 bus or a train, you never could find those people. You'd
14 never -- no idea where to start to look. Like I said, that's
15 pretty much it. But pretty much a given.

16 But to kind of wrap up in the same vein I started
17 with, proof beyond a reasonable doubt, someone related this to
18 me and I think it's a good idea how to understand the concept.

19 Let's assume as I stand in front of the jury -- you
20 never saw the defendant. Defendant was sitting in that seat
21 with a bag over his head. The whole trial. You never knew
22 who it was. He was referred to let's say by a number and not
23 by a name and you heard the testimony that you heard in this
24 trial. Okay?

25 If you feel that, on the testimony that you heard,

~~Sauter summation~~

28

1 that if you went into the jury room, deliberated and came back
2 out here saying to the Court and return a verdict of guilty
3 saying, yes, we feel tht the State has proved this case beyond
4 a reasonable doubt, that you would then not get upset and that
5 you would still have faith in the fact that you felt the case
6 was proven to you beyond a reasonable doubt.

7 If after the verdict was rendered the bag came off
8 the defendant's head and it was your wife, your husband, your
9 brother, your sister, or your child, if you have enough
10 confidence that the State has proved your case beyond a
11 reasonable doubt and you can convict somebody that you knew
12 based on what you heard, then by all means I have absolutely
13 no argument. You'd have to return a verdict of guilty.

14 But in that type of a vein that you would come out
15 here and get upset then that maybe you didn't consider
16 something to the extent you should have or maybe they really
17 didn't prove it the way they should have and you would be
18 upset if you have didn't know the defendant, then in that
19 circumstance the case has not been proven to you beyond a
20 reasonable doubt. And I am asking that you severely analyze
21 the testimony that the defense has presented to you no matter
22 what agencies add and come to your own conclusion, come to a
23 conclusion that's in accordance with what you believe to be
24 the facts and what you believe to be having justice served by
25 returning a verdict.

~~Sauter summation~~

29

1 Thank you.

2 THE COURT: Thank you, Ms. Sauter.

3 Mr. Cunningham.

4 MR. CUNNINGHAM: Thank you, Your Honor.

5 By the same token, let's say you sat here during this
6 trial and called the victim, she came in, sat behind a screen,
7 you never knew who she was 'til after you reached your
8 verdict. Same applies there if after your verdict you take
9 the screen away and the victim is, in fact, your spouse, your
10 child, your loved one.

11 If you think back to jury selection, you'll recall
12 among the questions that were asked do any of you know
13 anybody, the witnesses, the victim, the defendant, the
14 attorneys, the police officers. You were asked if you did
15 will that affect your ability to decide this case. And
16 there's a reason for that. The reason for that is this: both
17 sides are supposed to ask you to decide this case based on the
18 evidence. Not based on the emotion, not based on sympathy but
19 on the evidence. And that's why we don't use jurors who are
20 the family of the defendant. That's why we use people who
21 don't know anybody and who will listen to the evidence and
22 return a verdict that's based on it.

23 So when she asks do you consider that maybe she's a
24 relative, of course, well, my response is just as much as the
25 victim's irrelevant to the jurors.

EXHIBIT C

Direct

60

(Recess taken.)

(After recess.)

THE COURT: All right, Mr. Cunningham,

MR. CUNNINGHAM: Thank you, your Honor. State calls

COURT OFFICER: Kindly place your left hand on the
Bible and raise your right hand. Kindly state your full name
for the record and spell your last name.

THE WITNESS:

, having been duly sworn, was
examined and testified as follows:

DIRECT EXAMINATION BY MR. CUNNINGHAM:

Q , stand back here, and I'll ask you to keep
your voice up so I can hear all the way back here.

Okay. You have to answer yes or no.

A Yes.

Q A little bit louder.

A Yes.

Q And that's perfect. You speak into that microphone
like that. I'll be able to hear you. If I ask you anything and
you don't understand that question, I'll try and ask that
question again. You have to say yes or no so, the lady in
front of you can write it down.

A Yes.

K

- Direct

61

1 Q How old are you, please?

2 A Twenty-one.

3 Q And back in 1988, where were you living?

4 A [REDACTED] North Fifth Avenue, Long Branch.

5 Q Who did you live there with?

6 A My mother and my father.

7 Q Were you working back then?

8 A Yes.

9 Q Where did you work?

10 A McDonald's.

11 Q What did you do at McDonald's?

12 A Cashier.

13 Q Do you recall what type of hours you worked, work the
14 same hours every day, every week, did they rotate?

15 A Rotates sometimes on the weekends.

16 Q Okay. On the weekends, what type of hours did you
17 usually work?

18 A 11:00 --

19 MRS. SAUTER: I'm going to object.

20 A 11:00 to 7:30.

21 MRS. SAUTER: What she worked this particular day.

22 THE COURT: Let's -- this is just preliminary
23 background. I'll overrule the objection, go ahead.

24 Q I'm sorry. You say on the weekends you usually work
25 when?

k

- Direct

62

1 A 11:00 to 7:30.

2 Q That would be 11:00 in the morning to 7:30 at night?

3 A Yes.

4 Q And was that working as a cashier?

5 A Yes.

6 Q Did you work any positions at that time, other than
7 cashier?

8 A No.

9 Q And how would you get to and from work?

10 A Walk.

11 Q How would you get from your house to the McDonald's?

12 A Walked.

13 Q What route would you take, what street would you walk
14 on?

15 A Fifth Avenue and Broadway.

16 Q I can't hear you, I am sorry.

17 A Fifth and Broadway.

18 Q Fifth and Broadway. What would you do when you got to
19 Broadway? You walked up Fifth Avenue to Broadway, right?

20 A Yes.

21 Q When you got to Broadway, what did you do?

22 A Turn, make a left turn.

23 Q And then how would you get to the McDonald's?

24 A Go straight down.

25 Q And that's where the McDonald's is?

- Direct

63

1 A Yes.

2 Q I'd like to direct your attention back to a Sunday,
3 September 18th, 1988; did you work that day, if you recall?

4 A Yes.

5 Q You recall what hours you worked?

6 A 4:00 to 10:00.

7 Q 4:00 in the evening?

8 A Yes.

9 Q Till 10:00 in the evening?

10 A Yes.

11 Q And what position were you working that night?

12 A Cashier.

13 Q Now, when you worked McDonald's, would you wear any
14 special clothes, or would you just wear whatever you had on
15 that day?

16 A Uniform.

17 Q Can you describe your uniform for me, please?

18 A Green with white stripes.

19 Q A dress?

20 A No, no, shirt and a pants.

21 Q Pants also green with white stripes?

22 A No, just green.

23 Q I'd like to show you, if I may, a shirt and pair of
24 pants previously been marked S-2 and S-3; do you recognize --
25 first why don't you take S-2, would you take these, do you

k

- Direct

64

1 recognize these at all?

2 A Yeah, that's the work --

3 Q You have to keep your voice up.

4 A I used to work in these.

5 Q What are these?

6 A My uniform.

7 Q These are the pants for your uniform?

8 A Yes.

9 Q And what about S-3, do you recognize this shirt?

10 A Yes, that's my uniform top.

11 Q Is that the top?

12 A Uh-huh.

13 Q When was the last time you saw this shirt and these
14 pants? These particular ones?

15 A I don't remember.

16 Q Are these the shirt and pants that you were wearing on
17 September 18th, 1988?

18 A Yes.

19 Q What time did you get off work that night?

20 A I don't remember. I think it was about 10:00, 10:15.

21 Q Okay. And what, did the McDonald's close at that time
22 or did your shift just end?

23 A No, my shift ended.

24 Q So, somebody would have come on to replace you?

25 A No.

- Direct

65

1 Q They would have closed your register?

2 A Yes.

3 Q And after your shift ended, did you have to do
4 anything with, what do they call it, the bank or whatever they
5 call it, the tray or the money, you have to count up the money
6 and account for it?

7 A No.

8 Q Somebody else does that?

9 A Yes.

10 Q Was there anything after your shift ended that you had
11 to do at the McDonald's?

12 A I had to stock up cups and stuff for the morning.

13 Q Supplies?

14 A Yeah.

15 Q You know how long that took you that night?

16 A No, I don't remember.

17 Q Did there come a point in time when you left the
18 McDonald's that night?

19 A Excuse me?

20 Q Did there come a time when you left that McDonald's
21 building that night?

22 A No.

23 Q After you got off work, did you leave the building at
24 some point?

25 A Yes.

HARRELL 00542

- Direct

66

1 Q Okay. Do you know what time that was?

2 A I don't remember exactly what time that was.

3 Q Can you give us an approximate time, or can you tell
4 us about how long after you got off work it was?

5 A Probably about 15 minutes, about 10, 15.

6 Q Ten or fifteen?

7 A 10:15.

8 Q About 10:15?

9 A Yes.

10 Q And that was after you got done stocking the supplies?

11 A Yes.

12 Q Did you do anything else after you got done stocking
13 the supplies before you left?

14 A No.

15 Q You didn't stop to eat or stop to talk to your
16 friends or anything?

17 A No.

18 Q When you left the McDonald's, where were you going to
19 go to?

20 A Home.

21 Q And did you leave alone or with anybody else?

22 A Alone.

23 Q How did you -- what route did you follow in order to
24 go home that night?

25 A I went straight up Broadway, and then make a right to go

HARRELL 00543

K

- Direct

67

1 back to Fifth Avenue.

2 Q Can you tell me the streets that you would walk past
3 as you walked up Broadway?

4 A The streets? It's just Broadway.

5 Q Are there any cross streets that you would walk past
6 or cross over?

7 A No.

8 Q So, as you walk from the McDonald's, the first street
9 you get to would be Fifth?

10 A Yes.

11 Q Okay. Did something happen to you as you walked
12 home?

13 A Yes.

14 Q As you were walking along Broadway, were you on the
15 left side of the, or the right side of the street?

16 A The right.

17 Q Is that the same side of the street the McDonald's is
18 on?

19 A Yes.

20 Q What happened to you as you were walking along that
21 side of the street? Did you see somebody?

22 A Yes.

23 Q Where did you see that person?

24 A On the corner.

25 Q You recall which corner, or what's on that corner?

k

- Direct

68

1 A Store, stores.

2 Q I can't hear you, I'm sorry.

3 A A store.

4 Q What type of a store?

5 A I don't remember.

6 Q Okay. Where was this person, what was he doing?

7 A Just standing there.

8 Q And was there anything about him that attracted your
9 attention, or did you just notice that he was standing there?

10 A I just noticed he was standing there, because he was,
11 because I was walking past.

12 Q Was he standing on the side of the street that you
13 were walking on?

14 A Yes.

15 Q How close was he standing, or was he moving?

16 A He was standing.

17 Q And do you recall which way he was facing, was he
18 facing in this store, was he facing you or facing away from
19 you?

20 A I don't remember.

21 Q In order to get home, would you have to walk past this
22 person?

23 A Yes.

24 Q And did you do that?

25 A Yes.

k

- Direct

69

1 Q Did you have any conversation with that person at
2 that time? Did either of you say anything?

3 A He said something to me.

4 Q Tell us what he said to you.

5 A He said was I old enough to have sex, and I said leave me
6 alone.

7 Q Was there anybody else in the area when he said that
8 to you?

9 A No.

10 Q How far from you was he when he said that?

11 A I don't know.

12 Q Was he as far away from you as I am from you right
13 now?

14 A Yeah, I guess.

15 Q I am sorry.

16 A Yes.

17 Q Was he further away than I am right now?

18 A No.

19 Q And as he said this, were you still walking toward him
20 or had you passed him at this point?

21 A I was passing.

22 Q I'm sorry?

23 A I was walking past.

24 Q Had you already gone by him?

25 A Yeah.

k

Direct

70

1 Q Or were you still getting closer to him?

2 A I was going by him.

3 Q Did you get any -- was he in front of you or was he
4 behind you when he said this?

5 A Behind me.

6 Q Had he said anything to you before that?

7 A No.

8 Q What happened next?

9 A I just kept walking, and then I felt somebody grab my neck.

10 Q How far had you walked when you felt somebody grab
11 your neck?

Don't know.

Q Had you gone as far as from where you are to this back
14 window back here, or the wall with a painting on it, had you
15 gone that far?

16 A No.

17 Q Had you gone as far as this short little wall right
18 here?

19 A Yeah.

20 MR. CUNNINGHAM: Judge, do you have measurements up
21 there, as far as from the bench to the witness chair to this
22 bar?

23 THE COURT: It's 25 feet 9 inches from the witness
24 chair to that rail.

25 MR. CUNNINGHAM: Thank you.

- Direct

71

1 Q Were you able to see the person that grabbed you by
2 the neck?

3 A Yes.

4 Q Had you seen that person before he grabbed you by the
5 neck?

6 A I saw him once before.

7 Q I'll get to that in a second.

8 Was the person that grabbed you by the neck the person
9 that you had just walked by?

10 A Yes.

11 Q How do you know that?

12 A Because I saw his face.

13 Q Can you describe for us how it was that he grabbed
14 you around the neck?

15 A From behind with his arm like this (indicates).

16 Q Okay. Can you hold your arm up to your neck the
17 way --

18 A Like this.

19 Q -- the way he had his arm around you, would you do
20 that so the Judge can see you, please?

21 A Like this.

22 MR. CUNNINGHAM: Judge, for the record, indicating a
23 forearm.

24 THE COURT: Forearm across the neck.

25 Q And where was he standing when he did this?

Direct

72

1 A Behind me.

2 Q What part of him were you able to see at this point?

3 A At first I saw his arm, but then I slightly turned around,
4 I saw his face.

5 Q How far was he from you when you saw his face?

6 A He still had my neck.

7 Q Was he as far from you as I am from you right now?

8 A No.

9 Q Was he closer?

10 A Yes.

11 Q How much closer?

12 A Right behind me.

13 Q Was this in the street, on the sidewalk, where?

14 A On the sidewalk.

15 Q Did he say anything to you at that point?

16 A I don't remember.

17 Q How did you feel at that point?

18 A Scared.

19 Q What did you do?

20 A I tried to scream.

21 Q Were you able to?

22 A Yes.

23 Q You did scream?

24 A Yes.

25 Q What, if anything, did he do?

k

- Direct

73

1 A He put his hand over my mouth, covering my mouth.

2 Q And did you keep screaming?

3 A No.

4 Q Why not?

5 A 'Cause I was scared.

6 Q What happened next?

7 A He had dragged me in back of the -- behind the Trophy
8 store.

9 Q Behind the what?

10 A Trophy.

11 Q The --

12 A Trophy.

13 Q The Trophy store?

14 A Yeah.

15 Q Okay. At this point, are you still on Broadway?

16 A Yes.

17 Q Or have --

18 A No, on the side of Fifth Avenue.

19 Q That would be the street you live on?

20 A Yes.

21 Q When you saw him initially, when he said something to
22 you, was he standing on Fifth or on Broadway?

23 A It was right at the corner.

24 Q And where were you at that point when he said that to
25 you, when he asked you if you were old enough for sex?

HARRILL 00551

1 A Going toward Fifth.

2 Q You were on Fifth at that point?

3 A I don't know, I guess.

4 Q At that corner?

5 A Yes.

6 Q You say that he dragged you to a lot?

7 A Yes.

8 Q Can you describe that lot for me?

9 A It was a parking space.

10 Q I've never been there, I have no idea what

11 it looks like. How good can you describe it for me?

12 A It was an empty parking lot.

13 Q How big, as big as this room?

14 A A little smaller.

15 Q You recall what the bottom's like, the ground?

16 A No.

17 Q Do you recall if there were any cars in it?

18 A No, there wasn't.

19 Q I am sorry?

20 A No cars.

21 Q What part of the lot did you go to?

22 A The back.

23 Q And how far from the sidewalk is the back of the lot?

24 either in terms of feet, or is it as far from you as the bar

25 here, or the wall with the painting, or further or closer, it

k

- Direct

75

1 you're standing on the sidewalk, how far is the back of that
2 lot?

3 A Probably a hundred feet.

4 Q Would that be closer or further than that window up
5 there?

6 A Further.

7 Q Much further?

8 A Yeah.

9 MR. CUNNINGHAM: Judge, does your measurements
10 indicate how far the back wall is, do your measurements
11 indicate?

12 THE COURT: Forty feet from the witness chair.

13 Q And if you're standing on the sidewalk looking into
14 that lot, where is the Trophy shop?

15 A Right here, right on the right.

16 Q On your right, as you're looking into the lot?

17 A Yes.

18 Q Is there anybody else around that you saw at that
19 point?

20 A No.

21 Q What happened when you got to the back of the lot?

22 A I remember him pushing me toward the fence.

23 Q What type of a fence?

24 A It was just a fence.

25 Q You have to talk a little bit louder. Is it a wooden

k

- Direct

76

1 fence like this in front of the jury here?

2 A No.

3 Q Do you recall what the fence was made of?

4 A No.

5 Q You recall how high the fence was?

6 A No.

7 Q Did he say anything to you at this point?

8 A I don't remember.

9 Q Did there come a point during this when he said
10 something to you again?

11 A No.

12 Q Where were his hands at this point?

13 A I don't remember.

14 Q What happened next?

15 A He had dragged my pants down.

16 Q Those are the pants that you showed us before?

17 A Yes.

18 Q I ask you to look at these pants, how do these pants
19 fasten?

20 A With the zipper up, and this button right here.

21 Q You have to talk louder.

22 A Buttons right here.

23 Q There's a button there?

24 A Yeah.

25 Q There's also a zipper?

993

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HARRELL 00553

k

- Direct

77

1 A Yes.

2 Q And is there a belt?

3 A Yeah, it buckles.

4 Q How does this belt work, can you show us how this belt
5 works?

6 (Witness complies.)

7 Q Did you have the pants zipped and buttoned and the
8 belt shut when he attacked you?

9 A Yes.

10 Q And did there come a point in time when the belt was
11 undone?

12 A I don't remember.

13 Q How about when the pants were unbuttoned?

14 A I don't remember.

15 Q How about when the pants were unzipped?

16 A (No response).

17 Q Did you keep your pants on the whole time?

18 A Yes.

19 Q Was there any point in time when you didn't have your
20 pants on?

21 A No.

22 Q I ask you to look at the zipper here, see here where
23 the track is broken?

24 A Yes.

25 Q Was that like that when you went to work that night?

K

- Direct

78

1 A No.

2 Q Do you know how that got like that?

3 A When he pulled them down.

4 Q I am sorry?

5 A When he pulled them down, when he dragged them down.

6 Q What did he do to drag your pants down? Tell us how
7 he did that, what did he do?

8 A It happened fast, I don't remember.

9 Q Okay. Were you able to see what he was doing as far
10 as taking your pants off?

11 A No.

12 Q Did you take your pants off?

13 A No.

14 Q Was there anybody else there?

15 A No.

16 Q Did you help him take your pants off?

17 A No.

18 Q Did you try and keep him from taking your pants off?

19 A Yes.

20 Q And were you able to keep him from taking your pants
21 off?

22 A No.

23 Q Did he take any of your other clothes off?

24 A My panties had come down with my pants at the same time.

25 Q Okay. And did you take the panties off?

0/53

PHOTO BY: ANTHONY, AL 8/10/02 LASER: LK/DA

HARRELL 00555

k

Direct

79

1 A No.

2 Q Did you help him take the panties off?

3 A No.

4 Q And I'll show you, if I can, what's marked as S-5; do
5 you recognize these?

6 A Yes.

7 Q What are these?

8 A My panties.

9 Q Okay. Is this how they looked when you put them on
10 that day?

11 A I don't remember.

12 Q Okay. If you look on the inside here, there appears
13 to be some blood or stain of some sort?

14 A Yes.

15 Q Do you recall, was that there when you put them on
16 that day?

17 A I don't remember, I guess.

18 Q What happened after he got your pants and your panties
19 off, what did he do to you?

20 A He was touching me.

21 Q With what?

22 A With his hand.

23 Q Where was he touching you?

24 A On my vagina.

25 Q Did he put his hand in your vagina?

PENDING ON PAYMENT TO JURY - LAST PAGE 4

993

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Direct

80

1 A Yes.

2 Q Did he put anything else in your vagina?

3 A Yes.

4 Q What?

5 A His penis.

6 Q Which did he do first?

7 A His hand.

8 Q Did he say anything at that point?

9 A No.

10 Q Did he say anything when he put his penis in your
11 vagina?

12 A No.

13 Q How long did he have his hand in your vagina?

14 A For about a couple of seconds.

15 Q And how long did he have his penis in your vagina?

16 A For about five minutes.

17 Q And where in the parking lot were you at that point?

18 A In the back.

19 Q Were you standing up, lying down?

20 A On the ground.

21 Q On the ground?

22 A Yes.

23 Q You recall what the ground was like back there?

24 A No.

25 Q Were you able to see his face at all during this,

953
FBI/DOJ - JAMES EARL RAY

HARRELL 00557

[REDACTED] - Direct

81

1 while you're in the parking lot?

2 A Yes.

3 Q Where was he, that you could see his face?

4 A On top of me.

5 Q How far from your face was his face? You show us with
6 your hands.

7 A About (indicates).

8 Q Do that again so the Judge can see, please?

9 A About this high.

10 THE COURT: Five, four inches from her face.

11 Mr. Cunningham --

12 MR. CUNNINGHAM: Yes, sir.

13 THE COURT: -- I made a commitment to you about
14 timing.

15 MR. CUNNINGHAM: Yes, sir.

16 THE COURT: Perhaps now is a time to take a break.

17 MR. CUNNINGHAM: Yes, sir.

18 THE COURT: All right.

19 All right. Would you step down, [REDACTED]?

20 (Whereupon the witness steps down.)

21 THE COURT: All right, ladies and gentlemen. We're
22 going to terminate the testimony now, we'll start again
23 promptly at 9:15 tomorrow.

24 All right. Don't discuss the case among yourselves or
25 with anyone else. Drive carefully, we want all fourteen of you

EXHIBIT D

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Nichols

178

Q. How big was the vault, out of curiosity?

A. I would say 20 by 12.

Q. And you mean feet?

A. And an iron door. Excuse me?

Q. You mean 20 feet by 12 feet?

A. Approximately. With a cast iron door with a lock on it.

Q. It's like a bank vault?

A. Right.

Q. Now, I'm going back, this is page 3 of 53.

A. Okay.

Q. Can you read this? I can zoom in.

A. That's Ted's notes I think, right?

Q. Okay. That was my next question. 3 of 53 on Exhibit A are notes by Ted Mozer?

A. Yes.

Q. Sorry, wrong direction. Now, actually I'll zoom in a bit. This is page 2 of 53. And it says Date of Report

1 Nichols 179

2 4/15/89. Do you see that?

3 A. Yes.

4 Q. Now, this says Results of
5 Examination and then it has a paragraph he
6 typed out, is that correct?

7 A. Yes.

8 Q. And he signs this, is that
9 correct?

10 A. I'm sorry, what was that?

11 Q. And he signs this paragraph, this
12 report?

13 A. Ted, yes.

14 Q. Is this his final conclusions
15 regarding the trace evidence?

16 A. I would imagine.

17 Q. Once you're finished doing
18 testing, you'd come to some sort of
19 conclusion, is that fair to say?

20 A. Yes.

21 Q. Would you type up a summary of
22 what you had determined once you were done
23 testing?

24 A. Sometimes.

25 Q. Okay. Let me zoom out. Now, I'd

1 Nichols 180

2 just like to go to -- this is page 1 of 53.

3 And it's dated 4/28/89, is that correct?

4 A. Yes.

5 Q. Now, this is page 1 of 1, so it's
6 the only page in this report?

7 A. There was only 1 of 1, yes.

8 Q. Okay. And this is a summary of
9 your conclusions regarding Dion Harrell's
10 blood and saliva, is that right?

11 A. Correct.

12 Q. And it's signed by you?

13 A. Correct.

14 Q. And you sent it back to the Long
15 Branch Police Department, is that right?

16 A. Yes.

17 Q. Now, in this report, it doesn't
18 contain any information regarding what the
19 results of Dion Harrell's testing means
20 vis-à-vis the results of the victim's
21 testing, right?

22 A. No, it's two separate reports.

23 Q. Okay. Did you draft a report
24 that analyzed the two sets of forensic
25 tests together?

1 Nichols 181

2 A. Together?

3 Q. Yeah.

4 A. No, there's a report generating
5 the information from the victim's clothing
6 and then the report generating Dion
7 Harrell's results.

8 Q. Right. And is it fair to say
9 that you ultimately testified as to the
10 chances that Dion Harrell could be excluded
11 from the material that you tested from the
12 suspect?

13 A. Not excluded. Included.

14 Q. Okay. You testified as to the
15 chances he could be included?

16 A. Yes.

17 Q. Okay. Now, is it fair to say
18 that a layperson wouldn't know that from
19 looking at this April report and the
20 January report regarding the suspect?

21 MR. O'BRIEN: Objection to the
22 form. You may answer.

23 A. Correct.

24 MR. SIMMONS: Join.

25 Q. How would the police department

1 Nichols 182

2 learn your conclusions regarding the fact
3 that Dion Harrell could be included as
4 providing the material that you tested from
5 the suspect?

6 MR. O'BRIEN: Objection to the
7 form. You may answer.

8 A. Would you repeat the question,
9 please?

10 Q. After the -- let me phrase it a
11 little differently.

12 After the January 1989 report
13 regarding the forensic testing on the
14 victim's material, and the April 1989
15 testing of samples from Dion Harrell, did
16 you call the police department to explain
17 what those tests meant?

18 A. No.

19 Q. Did you call the prosecutor?

20 A. No.

21 Q. How would they know what that
22 testing meant, taken together?

23 MR. O'BRIEN: Objection to the
24 form. You may answer.

25 MR. SIMMONS: Join.

1 Nichols 183

2 A. There was no specific conclusion
3 that we could reach. Therefore it was
4 never put into the report.

5 Q. So to rephrase, if there's no
6 specific conclusion that can be reached,
7 you wouldn't generate a report saying that?

8 A. No.

9 Q. Okay. Now, actually, I'm going
10 to -- jumping around a bit, I apologize --
11 I'm going to go back to -- and pardon my
12 clicking through, I'll land and then
13 explain.

14 Going back to 16 of 53. Now,
15 this report is dated January 13th, 1989 and
16 it's the testing of the materials obtained
17 from the victim. Now --

18 A. Oh. All right.

19 Q. Do you have it?

20 A. I got the wrong page. Okay. Go
21 ahead.

22 Q. And you're looking at the --
23 withdrawn.

24 Now, I think you testified
25 earlier that there were instances where AP

1 Nichols 184

2 would come up positive but the sperm and
3 p30 tests would come up negative, right?

4 A. Correct.

5 Q. And the sperm test requires you
6 to actually see a spermatozoa in the
7 sample, right?

8 A. Correct.

9 Q. Now, could you tell me how
10 sensitive the p30 test is?

11 A. Couldn't give you any idea.

12 Q. Okay. Well, let me put it
13 differently. Were there instances where --
14 let's say going back to 1989, were there
15 instances where you'd test a sample that
16 was positive for p30 but there was not
17 enough material to get a positive result in
18 the absorption-inhibition test?

19 MR. O'BRIEN: Objection to the
20 form. You can answer.

21 A. Are you saying positive p30 but
22 insufficient sample?

23 Q. For absorption-inhibition.

24 A. I would say that would be --
25 usually if we had enough for p30 -- seminal

1 Nichols 185

2 stains can be as small as a postage stamp
3 or as big as a dinner plate. So it would
4 depend on the sample that were being
5 tested.

6 Q. Right. My specific question
7 though is, were there instances when you
8 got a positive on the p30 test but did not
9 have enough material to get a result on the
10 absorption-inhibition test in 1988?

11 A. I don't recall any.

12 Q. Okay. Do you have a copy of the
13 500-page manual?

14 A. No.

15 MR. RICKNER: Mr. O'Brien,
16 Exhibit D?

17 MR. O'BRIEN: Yeah, are you
18 asking me a question?

19 MR. RICKNER: Does he have
20 Exhibit D?

21 MR. O'BRIEN: I e-mailed it to
22 him. I don't believe he printed it
23 out.

24 MR. RICKNER: Okay.

25 MR. O'BRIEN: Why don't you just

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Nichols 186

put it up on the screen and ask him questions from the screen.

MR. RICKNER: That's what I was going to do.

Q. Mr. Nichols, can you see the screen well enough that you could just read it off the screen if I zoomed in on different sections?

A. I have to get closer. Go ahead.

Q. Okay. I'm going to bring up -- we're way off.

Can you see a square that says Special and Tech. Services Section?

A. Yes.

Q. Okay. That's not actually the first page of the forensic manual though. Now we're on 5 of 478 on Exhibit D. Can you see New Jersey State Police Office of Forensic Sciences?

A. Yes.

MR. RICKNER: And then, for the record, this is Harrell 106.

A. Yes.

Q. And you received the electronic

Nichols

187

copy of this?

A. Yes.

Q. And did you recognize this exhibit to include the biochemistry manual that was in place from 1980 to 1991?

A. Yes.

Q. Now, besides this biochemistry manual -- withdrawn.

Would you consult this biochemistry manual with regards to how to perform testing?

A. Yes.

Q. Were there any other documents generated by the State of New York that also had guidelines for testing?

MR. O'BRIEN: State of New Jersey.

Q. Withdrawn. Did it again.

Were there any other documents besides this biochemistry manual, from 1980 to 1991, that were generated by the State of New Jersey in instructing you how to perform biochemical tests?

A. No. This is the lab manual.

1 Nichols 188

2 Q. Okay. When you say lab manual,
3 what do you mean?

4 A. The biochemistry manual which
5 shows you how to make up reagents, what to
6 test, what to look for.

7 Q. This is a summary of how the lab
8 is run?

9 A. Well, it's instructions how to do
10 testing.

11 Q. Now, I'm going to move down to
12 page 231 -- I should say it's Harrell 231,
13 so it's going to be a little -- and I
14 apologize for scrolling.

15 Now, this is page 130 out of 478
16 at the top. Do you see it says Standard
17 Operating Procedures for Biochemical
18 Evidence?

19 A. Yes.

20 Q. And this is signed by T
21 something. Who is that?

22 A. That's Tom Brettell.

23 Q. Who's Tom Brettell?

24 A. Tom Brettell was the Central Lab
25 supervising scientist, then he was the

1 Nichols 189

2 supervising scientist at Hammonton, then he
3 was the assistant chief scientist, and then
4 eventually became the chief scientist, over
5 a period of 20 years or so.

6 Q. Did he write this section of the
7 manual?

8 A. I don't know.

9 Q. Now, I'm going to scroll down to
10 section 5, this is Harrell 232 -- no,
11 that's not, excuse me.

12 This is 133 and I believe it's
13 Harrell 234. So at the top, it says Record
14 Keeping. Do you see that?

15 A. Yes.

16 Q. And one of the sections says
17 "must completely document the location of
18 all stains and all negative controls." Do
19 you see that?

20 A. Yes.

21 Q. Now, when it says location, what
22 do they mean by "the location of all stains
23 and all negative controls"?

24 A. Where they are on the garment.

25 Q. Okay. And how would you perform

1 Nichols 190

2 this documentation?

3 A. I would put my identification
4 tags on the location of the stain and/or
5 control.

6 Q. Okay. So the way this
7 requirement was satisfied was with the
8 index cards that we discussed earlier?

9 A. Yes.

10 Q. Now, I'm on page 110 of Exhibit
11 D, this is Harrell 211. Can you see this,
12 Mr. Nichols?

13 A. Yes.

14 Q. It says Format for Reporting
15 Results. Do you see that?

16 A. Yes.

17 Q. Now, if we scroll down onto the
18 next -- the following page, it says, "The
19 following formats will be used in
20 interpreting data." Do you see that?

21 A. Yes.

22 Q. Now, let's look at number 1.
23 That says that genetic markers found in a
24 specimen are consistent with those found in
25 the whole blood of the suspect, do you see

1 Nichols 191

2 that?

3 A. Yes.

4 Q. Now, where would you type up this
5 paragraph if that were the conclusion that
6 you reached in a particular test?

7 A. I would go on a separate page on
8 the multi-page report.

9 Q. Okay. So if you go back to the
10 report that Mr. Mozer did regarding the
11 conclusions in the hair sample, a page like
12 that would be used to provide the data
13 interpretation for biochemical analysis?

14 A. Correct.

15 Q. Okay. Now, if you look at the
16 bottom of this page, it says, "All
17 non-conforming statements will be approved
18 by the Technical Director and a copy will
19 be forwarded to the Assistant Chief
20 Chemist"?

21 A. Correct.

22 Q. Now, in 1988, who was the
23 technical director that would have to
24 approve this?

25 A. That would be Henry Swordsma.

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Nichols

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Q. Okay. And who would be the assistant chief chemist?

A. In 1988 that would be Chris Tindle.

Q. Now, is it fair to say that for Dion Harrell's case, you did not use one of these seven options?

A. Correct.

Q. Why not?

A. Because the victim and the suspect were the same genetic markers, O secretors.

Q. Now, look at number 7, do you see that?

A. Yes.

Q. Would this capture the results in the Harrell case?

A. Yes.

Q. Okay. Is there a reason that you didn't use entry 7 in a report?

A. No.

Q. Can you tell me why not?

A. I guess I just forgot.

Q. Okay. Were you required to issue

1 Nichols 193

2 a conclusion in your reports?

3 A. Was I required to?

4 Q. Right.

5 A. No.

6 Q. So it was up to your discretion
7 as to whether or not to provide a final
8 analysis regarding your findings or not?

9 MR. O'BRIEN: Objection to the
10 form. You can answer.

11 A. Correct.

12 THE WITNESS: Am I supposed to
13 answer or?

14 MR. RICKNER: No, you did.

15 MR. O'BRIEN: You can answer.

16 Q. Hold on for one moment.

17 Now, I'd like you to turn to
18 Exhibit B, it's the testimony.

19 (Biochemistry Manual Bates
20 Stamped NJSP HARRELL 102 through 579
21 marked Exhibit D for identification)

22 Q. Now, Mr. Nichols, did you have an
23 opportunity to review your testimony from
24 the trial of Dion Harrell?

25 A. Yes.

EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

-----x

KYHALLISTA JOHNSON as
Administrator of the Estate of
DION HARRELL,

Plaintiff,

-against-

Index No.

18-cv-11299 (FLW) (LHG)

STATE OF NEW JERSEY, NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC
SAFETY, DIVISION OF STATE POLICE,
JOHN T. NICHOLS, BRIAN O'GIBNEY,
AND CITY OF LONG BRANCH,

Defendants.

-----x

June 2, 2022

10:33 a.m.

Videotaped videoconference deposition
of HENRY SWORDSMA, taken by Plaintiff,
reported remotely by Elizabeth Santamaria, a
Shorthand Reporter and Notary Public by and
for the State of New York.

REMOTE APPEARANCES:

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14 Wall Street

New York, New York 10005

BY: ROBERT RICKNER, ESQ.

DEPUTY ATTORNEY GENERAL

TIMOTHY P. O'BRIEN

Attorney for State Defendants, State of

New Jersey, Department of Law and

Public Safety, Division of State Police

and John T. Nichols

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555 Rt. 1 South - Suite 440

Iselin, New Jersey 08830

BY: FRANK J. DYEVOICH, ESQ.

PRESENT:

EMILY ROSE CARLTON

THOMAS DEVINE, Legal Video Specialist

STIPULATIONS

IT IS HEREBY STIPULATED AND AGREED, by
and between counsel for the respective
parties hereto, that all objections, except
as to form, are reserved to the time of
trial.

IT IS FURTHER STIPULATED AND AGREED
that the deposition may be signed and sworn
to before any officer authorized to
administer an oath.

IT IS FURTHER STIPULATED AND AGREED
that the sealing and filing of the
deposition be waived.

1
2 THE VIDEOGRAPHER: Good morning.
3 We're going on the record at 10:33 a.m.
4 on June 2nd, 2022. This is video unit
5 one, volume one of the deposition of
6 Henry Swordsma, in the matter of
7 Johnson v. State of New Jersey.

8 It is June 2nd, 2022. This
9 deposition is being taken via zoom with
10 all parties appearing remotely. My
11 name is Thomas Devine and I am the
12 videographer. The court reporter is
13 Elizabeth and we're both from Pirozzi &
14 Hillman.

15 Counsel, would you please
16 identify yourselves and whom you
17 represent.

18 MR. RICKNER: Hello. My name is
19 Rob Rickner, Rickner PLLC, and I
20 represent the estate of Dion Harrell.

21 MR. DYEVOICH: My name is Frank
22 Dyevoich with Rainone, Coughlin,
23 Minchello, D-Y-E-V-O-I-C-H, and we
24 represent the City of Long Branch and
25 Officer O'Gibney.

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MR. O'BRIEN: Good morning.
Timothy O'Brien, Deputy Attorney
General on behalf of the State of New
Jersey, as well as John Nichols.

THE VIDEOGRAPHER: Thank you.
Would the court reporter please swear
in the witness, after which we may
proceed.

COURT REPORTER: Good morning.
My name is Elizabeth Santamaria. I am
a registered professional reporter and
New York State Notary Public.

This deposition is being held via
videoconference. The witness and I are
not in the same room. The witness will
be sworn in remotely and the parties
stipulate that the testimony is being
given as if the witness was sworn in
person.

So stipulated, Counsel?

MR. RICKNER: So stipulated.

MR. O'BRIEN: So stipulated.

MR. DYEVOICH: So stipulated.

(Continued on next page)

Swordsma

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HENRY SWORDSMA,

having been first duly sworn according
to law by the Officer, testifies as
follows:

EXAMINATION

BY MR. RICKNER:

Q. So, Mr. Swordsma, my name is Rob
Rickner and I'm going to be asking you some
questions today.

Have you ever had your deposition
taken before?

A. I've only had one deposition
before.

Q. Okay. Well, you may remember
these rules from your prior deposition or
you may remember them from your prep, but I
just want to put them on the record so we
can get the -- an opportunity to get the
best transcript that we can get.

So first, don't talk over me.
Wait for me to finish my long rambling
questions before jumping in with a response
so we get a nice question and answer on the
record. Can you do that for me?

Swordsma

8

A. Yes, sir.

Q. Okay. I have to ask this, but I'll make it brief. Do you have any issues with your memory for any reason?

A. Very good question. I'm going to say no.

Q. Is there anything --

A. I had to think -- I'm sorry.

Q. I'm sorry. I violated my own rule. I talked over you and I'm sorry about that. Let me phrase it differently. Is there any reason beyond the ordinary passage of time that you couldn't give full and complete testimony today?

A. Oh, no, no.

Q. And you said that you had had your deposition taken once before. Was that with respect to your work at the forensics lab?

A. Well, it involved the forensic scientist, but no.

(Telephone interruption)

A. Oh, someone is calling me. I will shut this off. I apologize. Let me

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Swordsma

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shut my own off. Sorry.

Q. When you say it involved a forensic scientist, were you testifying as an expert?

A. No.

Q. What was the subject of the litigation?

A. Racial and age discrimination.

Q. Were you a defendant in that lawsuit?

A. No.

Q. Have you testified in court before?

A. Yes.

Q. How many times have you testified in court, do you think?

A. I'm not sure. Around 200 times.

Q. And have you been cross-examined during your testimony in court?

A. Yes.

Q. So do you understand how important it is to give clear, accurate answers when you testify?

A. Yes.

Swordsma

10

1 Q. Did you prepare for this
2 deposition?
3

4 A. Well, I read -- I read the packet
5 with the laboratory report, so I looked at
6 that. And I'm going to say yes because I
7 observed something on the report. So, I'm
8 going to say yes.

9 Q. Okay.

10 A. Only because for examination of
11 evidence -- I'm sorry. I'm interrupting
12 you but I didn't answer that right. No. I
13 observed something on requests for
14 examination of evidence. So, I'm going to
15 say I did prepare for it.

16 Q. I guess I was using the word
17 prepare in maybe a different way than
18 you're using.

19 What I meant is, is that did you
20 have a discussion with Mr. O'Brien about
21 your testimony today and the questions that
22 are going to be asked?

23 MR. O'BRIEN: Objection to the
24 form. You may answer.

25 A. We met yesterday.

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Q. How long did you meet for?

A. Half an hour.

Q. And you said you reviewed some documents. You referred to as a packet. What was in the packet?

A. Well, the report. It involves the laboratory report from the regional laboratory and the request for examination of evidence, the results and then the notes, as well.

Q. Do you know what a Bates stamp is?

A. I'm sorry.

Q. This isn't a trick question.

A. No.

Q. Do you know what a Bates stamp is?

A. No. No, I don't.

Q. Did the documents you reviewed have little numbers on the bottom right or bottom left-hand corner?

A. Oh, I'm sorry. For example, what I'm looking at, this page I'm looking at, it says, resubmitted to the laboratory for

Swordsma

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storage, and it does have a date stamp.

Q. Not a date stamp. What I mean is --

You know what? Why don't I show you one. I am going to pull up what was clearly marked as an exhibit in this case. One moment.

All right can you see? For the record, this was marked as Nichols Exhibit A in a prior deposition and on the first page I'm going to scroll down -- actually, not a good example. I'm on the third page. Do you see right here where it says, NJSPHarrell1003?

A. Yes.

Q. Okay. Thank you. Do the documents you have have numbers like that, even if they are a bit hard to read because of the underlying text?

A. Give me a second, sir. There are a number of documents. No, no. The ones I'm looking at, no. I don't think any of them do, no.

Q. And how many pages are in the

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Swordsma 13

packet?

A. Can I give you an estimate?
Fifteen. Oh, I have this -- the subpoena
here, too. About 15.

MR. RICKNER: Now, Mr. O'Brien,
could you forward me a copy of whatever
documents you provided to Mr. Swordsma?

MR. O'BRIEN: I don't know that I
can do that at this time. I know I
sent him basically the lab reports.
So -- but I'm not able to reproduce
exactly what I sent to him.

Q. Mr. Swordsma, did you get those
documents via e-mail?

A. No. It was delivered -- it was
delivered by UPS.

MR. RICKNER: Okay. I'm going to
call for production of the exact
documents that Mr. Swordsma was
provided and I will ask that
Mr. Swordsma retain a copy.

Q. Besides the lab notes and reports
that you noted, did you review any other
documents?

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Swordsma

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A. No.

Q. Did you talk to Mr. Nichols?

A. No.

Q. You understand by Mr. Nichols I mean John Nichols?

A. John Thomas Nichols, yes. I did not talk to him.

Q. When was the last time you spoke to Mr. Nichols, to your knowledge?

A. Oh, okay. Yeah, in 2009.

Q. Okay. So would it be fair to say that you haven't spoken to Mr. Nichols in over a decade?

A. I haven't.

Q. Okay. I'm going to go through your educational background briefly. When did you start college? What year?

A. 1969.

Q. And did you finish in four years?

A. It was five years.

I gave an incorrect answer. I'm sorry. I started college in 1964 and I finished with my bachelor's degree in 1969.

Q. Okay. And what did you get a

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bachelor's degree in?

A. In chemistry.

Q. Did you go to graduate school?

A. Yes.

Q. When did you start graduate school?

A. 1969.

Q. And where did you go to college?

A. Virginia Tech.

Q. And where did you go to graduate school?

A. Oh, Virginia Tech is the graduate school. Undergraduate was Bloomfield College.

Q. And when did you finish graduate school at Virginia Tech?

A. 1972.

Q. And did you get it at --

What degree did you get?

A. Master's degree in chemistry.

Q. And following the master's degree in chemistry did you get any other degrees?

A. No. No, we did not.

Q. When did you start working in

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forensics?

A. 1972.

Q. And what job did you have?

A. I worked in the drug unit.

Q. Isn't that in the forensics labs
in New Jersey?

A. Yes, it was.

Q. Okay. Prior to beginning work in
the drug unit, did you get any specific
training in forensics?

A. No.

Q. In your bachelor's degree or
master's degree studies did you take any
classes on forensics?

A. No.

Q. When you got the job in the drug
lab, did they give you any training in
forensics?

A. Yes.

Q. What training was that?

A. I would analyze a case under the
supervision of someone who was already
trained. That lasted about six months.

Q. Besides on-the-job training, did

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you have any classroom training in
forensics when you started at the drug lab?

A. Periodically throughout my career I attended classes on various subjects. I went to -- like I said, the most significant one was in 2005 I went to the drug enforcement agency training for three days.

Q. Did you ever receive any certifications in forensics?

A. No.

Q. Did you ever hold any licenses with respect to forensics?

A. No.

Q. How long were you in the drug testing part of the New Jersey labs?

A. That was off and on. For example, I retired in 2009 from the drug unit, so it was off and on. Let me try and give you an estimate. Fifteen years.

Q. Okay. So, besides working in the drug testing lab did you have any other labs that you worked in as part of the New Jersey forensics --

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A. No.

Q. -- department?

A. No.

Q. Did you ever work at Sea Girt --

A. Oh, I'm sorry, sir. Yeah, my career is so weird. I worked in the ECRI testing unit for four years.

Q. And that would be at the racetrack?

A. Yes.

Q. Drug testing horses?

A. Yes.

Q. Okay. Did you ever work in Sea Girt?

A. At Sea Girt? Yes.

Q. In 1985 through 1990, can you tell me what title or titles you had at Sea Girt?

A. I was the supervising forensics scientist.

Q. As a supervising forensics scientist in that time period, what were your responsibilities?

A. I would review -- I would take --

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1
2 talk to people submitting evidence on more
3 complicated cases and I reviewed a lot of
4 the cases that went out of the laboratory.
5 And if someone had a problem, I would talk
6 to them. I did observe people in court
7 periodically also.

8 Q. Were you only supervising people
9 in Sea Girt or were you supervising people
10 in other locations?

11 A. Well, other locations as well.

12 Q. Who did you report to between
13 1985 and 1990?

14 A. It would be the chief scientist
15 and I -- I'm trying to think. I don't
16 believe we had an assistant chief scientist
17 then. So, I would report to the chief
18 scientist. Also, I would report to the
19 state police personnel on the laboratory.
20 They were on -- they were on site.

21 Q. Okay. Would it be correct to say
22 that the state police personnel handled
23 more of the administrative side rather than
24 the scientific side?

25 A. Yes.

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2 Q. Okay. Who was the chief that you
3 reported to?

4 A. It was -- all right. Give me a
5 second. That would be Dr. Richard
6 Saserstein during that time period.

7 Q. Now, I'll give you a second. If
8 you need water or if you need a break, just
9 ask.

10 A. Yeah. I should ask you for
11 permission. Sorry.

12 Q. You don't have to ask me for
13 permission.

14 A. Okay. Thank you.

15 Q. Did you receive any training in
16 blood testing?

17 A. Not -- I attended lectures, but
18 not really training in the analysis of
19 blood. No, no.

20 Q. Okay. Did you receive any
21 training in the analysis of semen?

22 A. No.

23 Q. Between 1985 and 1990, would you
24 have been capable of doing an AP test?

25 A. Just for the sake of my own

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1 knowledge, I did one or two AP tests. It
2 wasn't really part of the case work. It
3 was just to familiarize myself with the
4 procedure. I would say maybe two times I
5 did that.
6

7 Q. Okay. What about a p30 test?

8 A. P30? No, no.

9 Q. So it would be correct to say
10 that you've never done a p30 test?

11 A. No, I haven't.

12 Q. Have you done any antigen testing
13 to determine blood type?

14 A. No. No, I haven't.

15 Q. I'm sorry. You said you were the
16 supervising -- what was your title again?
17 I apologize for not writing it down.

18 A. Supervising forensic scientist,
19 between 1985 and 1990. Yeah. Yes.

20 Q. And how did you become a
21 supervising forensic scientist?

22 A. Well, you know, I gained
23 experience working in the laboratory
24 between the time that -- before the time
25 that was mentioned, and then we take civil

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service tests.

Q. So --

A. And I passed the civil service test and was assigned to the crime testing unit.

Q. Before supervising forensic scientist did you have to pass a specific civil service test?

A. Yes.

Q. Okay. And what were the subjects on that test, if you remember?

A. Yeah. It included other material besides forensic science. It did include forensic science, general chemistry, biochemistry, biology. It included -- I think some of the tests -- I'm getting confused what test was which, but included some supervisory questions.

Q. Questions about how to be a good manager? Things like that?

A. Yes. Yes, sir.

Q. Now, between 1972 and 1990, were you part of any forensics groups?

A. 70 -- yes.

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Q. Professional organizations.

A. Yes.

Q. Which ones?

A. The Northeastern Association of Forensic Scientists, the Mid-Atlantic Association of Forensic Scientists. You said 1990. Just give me a second, sir.

Okay. Yeah. That's it up until 1990.

Q. Are you familiar with the California Association of Criminalists?

A. I've heard of it. I don't know if I ever read any of their literature. I should say I don't remember if I read any of their literature.

Q. What about the Bureau of Forensic Services?

A. No. No, sorry.

Q. Were you John Nichols' direct supervisor between 1985 and 1990?

A. Yes.

Q. As his supervisor what did you do?

A. Now, just give me a second. I'm

1 Swordsma 24

2 not sure when he came to East Lab. It may
3 have been after 1985. I'm sorry. Could
4 you repeat your question, please. I was
5 too busy --

6 Q. Let me phrase it differently.
7 Let's say between 1987 and 1990 were you
8 John Nichols' direct supervisor?

9 A. Yes, sir.

10 Q. And what did you do with respect
11 to that supervision?

12 A. Well, I reviewed his work. I
13 talked to him, I evaluated him. I know I
14 observed him in court once -- it may have
15 been more than one time -- and I discussed
16 any problems that we might have in the unit
17 and discussed how he was interacting with
18 his fellow co-workers.

19 Q. Were there formal reviews?

20 A. Yes.

21 Q. Were there reports or some sort
22 of documentation generated following a
23 formal review?

24 A. There was documentation on that,
25 yes.

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Q. Is there a name for that document?

A. Yes. I can't -- give me a moment, please. I can't think of the formal name. I'm sorry.

Q. You also saw him in court at least once?

A. Yes.

Q. When was that? What year? I know you don't remember the date.

A. Probably in the time period from '87 to '90, I would say. And I'm not even sure. Somewhere in that period.

Q. Based on your supervision of Mr. Nichols, did you have any criticism of his work?

A. No. No, I didn't.

Q. When you supervised Mr. Nichols, did you ever have to discipline him?

A. No, I never did.

Q. When you were reviewing Mr. Nichols' work, did you ever find any errors?

A. I'm going to say I found some

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transcript -- clerical errors. You know, notes and stuff. And I don't remember specifically what they were but I know I always found things where their T's weren't crossed or something like that, equivalent to that, but I can't be specific.

Q. You mentioned earlier you noted something in the 15 or so pages worth of documents. Can you -- can you show me the page that you were referring to by holding it up to the screen? And I'm going to see if I can find it in my records.

A. I will show you the bottom of this page after --

Q. That says March what 1989?

A. March -- March 23rd?

Q. Okay. And is there a title in the document?

A. It's a request for examination of evidence.

Q. Let me see what I can do. Oh, I think I may have actually found it.

MR. DYEVOICH: You're a wizard.

MR. RICKNER: Well, it was right

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at the top. I think.

Q. So looking at Page 4, if you can see my cursor, this is Page 4 of Exhibit A marked in the Nichols deposition. Is this the document you're talking about?

A. Yeah. The one on the right.

Q. What is the issue that you noted?

A. I noticed I made a note, on the bottom right hand corner.

Q. Oh, that's your handwriting?

A. Yes.

Q. Oh, can you please read it?

A. I'm going to refer to this too.
I don't think I can read it off the screen.

Q. You can read it on your copy if that's easier.

A. Yeah. I have verbal -- that means verbal. And the Police Officer -- uhm, uhm. And I wrote his last name. I should have said Detective Crumrine but I said Crumrine.

I have the date and time which
right now I can't -- I'm sorry. I'm
leaving the screen for a second.

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Q. No. That's fine.

A. Okay. I said the time of the day. It looks like 10:26. My initials, I use HBS as my initials. And it's either May 10, 1989 or perhaps May 16th. And I said -- and I think something is cut off here. I said, Both victim and suspect H.

I'm sure the word are is cut off there. So, in other words, I'm saying both the victim and the suspect are blood group substance H.

Q. And what is the significance of both the victim and suspect being substance H?

A. Well, he was -- he was --

He was just making an inquiry and I said, when they were both blood group substance H, we could not draw a conclusion on them.

Could I just add, I didn't remember anything about the case but then when I saw that note that refreshed my memory. But I remember talking to him about that case.

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Q. So to be clear. During that conversation, did you tell him due to both the victim and the suspect being substance H that you couldn't draw any conclusions?

A. That's correct.

Q. Besides that, do you remember anything else about this case?

A. No, I don't.

Q. Now, when you cannot draw any conclusions from a test, would that be something that should be netted in a report?

MR. O'BRIEN: Objection to the form. You may answer.

A. No. To tell you the truth, I just think -- it is listed in the report. We do list his blood type and the secretor status in the victims. So I could include -- include it in the report and if someone has a question I will discuss it with them as I did. I don't mind doing that. But I think that's covered in the report.

And I don't resent the fact that

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1 he called me on that or anything, no. He
2 has a perfect right to do that but I really
3 think it's covered in the report. They're
4 both -- because you have somewhere, but you
5 have the results. Oh, and then we have
6 H -- blood group substance H was detected
7 in both their salivas. Their blood test is
8 O and the Lewis as indicative of a secreter
9 Lewis A1B plus.
10

11 I should tell you, in all
12 honesty, I wasn't sure about that and I
13 looked it up on the internet to refresh my
14 memory on that. I really wasn't sure about
15 the Lewis. But anyway, I did.

16 Q. If I understand what you're
17 saying correctly, the fact that both the
18 victim and the suspect tested positive for
19 the substance H is noted on the report but
20 the conclusion that you can't draw any
21 conclusions from that isn't noted on the
22 report?

23 A. I don't -- I -- oh, the
24 conclusion? No. No, it isn't.

25 Q. Should the conclusion be noted on

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the report?

MR. O'BRIEN: Objection to the form. It's been asked and answered. You can answer it again.

A. I think it's covered on the report, sir. I don't think so. Um.

Q. Well, let's -- let's do this in two ways. As a general matter, should a conclusion that no determination can be made pursuant to the testing that would be performed, generally be included in the report?

MR. O'BRIEN: Objection to the form. It's been asked and answered. You can answer the question again.

A. I didn't think it was necessary.

Q. In general or in this --

A. In a case just like this, which there were other cases like this too. Of course there were. Yeah, in something like I just think that everybody would understand. And as I said, Detective Crumrine called me and I know he's very experienced. So, I guess it didn't need

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1 explanation on occasion.

2 Q. So did you explain to Detective
3 Crumrine the conclusion regarding the H
4 substance?
5

6 A. That we couldn't draw a
7 conclusion. Yes, I did. That is why he
8 called actually. And I thought it was -- I
9 didn't write down everything he said. As
10 you can see, this is brief, but I thought
11 it would be best to write down the reason
12 we couldn't draw a conclusion. You know,
13 that they were both blood group substance
14 H. They were both the same.

15 Q. Just to be clear, did Detective
16 Crumrine tell you that no conclusion could
17 be drawn or did you say that to Detective
18 Crumrine?

19 A. I said that to him. He just --
20 when he called, he just wanted me to talk
21 about the case. He didn't really -- oh,
22 I'm sorry -- he didn't really ask a
23 specific question, to the best of my
24 knowledge.

25 MR. O'BRIEN: Just a moment. I'm